No. 96-243

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In the Supreme Court of the United States

OCTOBER TERM, 1996

BERNADINE SUITUM,
Petitioner,
v.
TAHOE REGIONAL PLANNING AGENCY,
Respondent

**On Writ of Certiorari To
The United States Court of Appeals
For the Ninth Circuit**

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether petitioner's as-applied regulatory takings claim is ripe when the merits of that claim turn on her contention that the transferable development rights (TDRs) to which she is entitled are a "ruse" lacking any market value, yet she has declined to make any effort to sell those TDRs she already possesses, to exercise her opportunities to obtain additional TDRs, or to apply for agency approval of any TDR sales.

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ORDINANCES AND CONSTITUTIONAL PROVISION INVOLVED

The relevant provisions of the Tahoe Regional Planning Agency Code of Ordinances are excerpted in an appendix to this brief.[1] The Fifth Amendment of the United States Constitution provides that "nor shall private property be taken for public use, without just compensation."

STATEMENT

Petitioner Bernadine Suitum filed this regulatory takings claim, contending that the Tahoe Regional Planning Agency's application of restrictions on development in stream environment zones amounts to an unconstitutional taking of her private property for public use, requiring the payment of just compensation under the Fifth and Fourteenth Amendments. The district court dismissed her complaint for lack of ripeness. The court of appeals affirmed.

1. Lake Tahoe and the Tahoe Regional Planning Agency

a. Lake Tahoe: Ever since John Fremont described his first sighting of Lake Tahoe, on February 14, 1844, the "Lake of the Sky" has captured the American imagination because of its unique and wondrous beauty. George W. James, The Lake of the Sky: Lake Tahoe 22 (Rev. Ed. 1956); J.A. 24. "Surely * * * the fairest picture the whole earth affords," Mark Twain wrote, in describing the Lake's "dazzling, brilliantly" transparent water where at "even

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[1] Because the TRPA Code of Ordinances may not be readily available to the Court, the appendix includes lengthy excerpts from Code provisions. In addition, the complete TRPA Goals and Policies and the TRPA Code of Ordinances have been lodged with the Court.

eighty feet deep[, e]very little pebble was distinct, every specked trout, every hand's breadth of sand." Mark Twain, Roughing It, 659, 654 (Library of America ed. 1984).

Lake Tahoe lies between the Sierra Nevada mountains to the west and the Carson Range to the east. It is the largest alpine lake in the world based on all of its physical dimensions, including depth and volume of water. Comment, Carl R. Pagter & Cameron W. Wolfe, Jr., *Lake Tahoe: The Future of a National Asset -- Land Use, Water, and Pollution*, 52 Cal. L. Rev. 563, 564 (1964). The Lake is as high as 6229 feet above sea level and contains approximately 126 million acre-feet of water at an average depth of 1027 feet and a maximum depth of 1645 feet. The Lake is 12 miles wide and 22 miles long, with 71 miles of shoreline and 192 square miles of surface.[2]

Lake Tahoe is "ultraoligatrophic," possessing extraordinarily clear and high quality waters because of very low concentrations of sediments, nutrients (especially nitrogen), and other contaminants. The low nutrient concentrations lower algal productivity, which, in turn, raises oxygen content. One major reason for the low level of nutrients is that the Lake Tahoe Basin offers a relatively small land surface area surrounding the Lake from which nutrient-contaminated runoff can flow into the Lake. Another reason is that riparian biologic communities in the area, known in the Basin as "stream environment zones" (SEZs), naturally absorb and thereby reduce the amount of sediment, nutrients, and other contaminants in the surface runoff into the Lake. There are approximately 17,700 acres of SEZ out

[2] See Douglas H. Strong, Tahoe: An Environmental History, -- (1984); S. Rep. No. 91-510, 91st Cong., 1st Sess. 3-4 (1969); H.R. Rep. No 91-650, 91st Cong., 1st Sess. 2-3 (1969); Comment, *Lake Tahoe: The Future of a National Asset, supra*, at 563-565.

of a total of 205,250 acres in the entire Basin.[3]

For these same reasons, however, "[t]he combination of weather, terrain, and vegetation together with highly erod[i]ble soils create within the basin a fragile environment." H.R. Rep. No. 91-650, *supra*, at 3. Disturbance of the natural surface soils and vegetation and the addition of impervious coverage in the Basin, especially in SEZs, has immediate and dramatic adverse consequences for water quality. The nutrients, sediment, and other contaminants in runoff flow into the Lake rather than being retained in SEZs. SEZs also represent a potent reserve of sediments and nutrients, based on years of their retaining these contaminants, which, once disturbed, are easily transported by runoff into the Lake. *Kelly v. Tahoe Regional Planning Agency*, 109 Nev. at 641, 855 P.2d at 1029; J.A. 22-23 (Tahoe EIS); I Tahoe Regional Planning Agency, Water Quality Management Plan for the Lake Tahoe Region -- 208 Plan, 94 (1988) ("TRPA 208 Plan"); John Ayer, *Water Quality Control at Lake Tahoe - Dissertation on Grasshopper Soup*, 1 Ecology L. Q. 3, 5-9, 37-39 (1971).

The aging process of the Lake -- eutrophication -- dramatically increases with the addition of these contaminants. Algae growth increases, clarity decreases, as does water quality more generally. These adverse effects are also potentially long lasting, if not irremediable. Because Lake Tahoe has only one natural outlet, the Truckee River, the Lake has a sharply reduced ability to cleanse itself once

[3] See J.A. 22-24 (excerpts from TRPA, Environmental Impact Statement for Adoption of a Regional Plan for the Lake Tahoe Basin (February 1983) (Tahoe EIS)); *Kelly v. Tahoe Regional Planning Agency*, 109 Nev. 638, 641, 855 P.2d 1027, 1028-1029 (Nev. 1993), cert. denied, 510 U.S. 1041 (1994); I Tahoe Regional Planning Agency, Water Quality Management Plan for the Lake Tahoe Region -- 208 Plan, 28, 94 (1988).

contaminated. Retention and flushing time is roughly 700 years, meaning that it takes approximately that amount of time for the Lake to fill itself (compared to 2.6 years for Lake Erie). I TRPA 208 Plan, *supra*, at 72-74; Ayer, *supra*, at 8.

The need for coordinated, carefully planned, and regulated development of properties affecting the Tahoe Basin and the Lake has been correspondingly great. Until relatively recently, however, there was very little coordination and planning and the Basin and Lake were the object of unrestrained waves of development -- mining, lumber, and, tourism -- since the late 19th century. J.A. 24; Strong, *supra*, at 19-55.

The political dimensions of the Lake exacerbated the complex ecological problem. "[T]he Basin is bisected by the California-Nevada line and politically subdivided by five counties and innumerable districts." 115 Cong. Rec. 33067 (1969) (remarks of Sen. Bible). Consequently, it was "impossible to mount a unified, coordinated control of this development." *Id.*

During the 1960s, it became apparent that time was "running out" for Lake Tahoe and the Tahoe Basin. 115 Cong. Rec. 33067 (1969) (remarks of Sen. Bible). The Basin witnessed "phenomenal growth and development," which was "indiscriminate" and "largely uncontrolled." *Id.*; *id.* at 33068 (remarks of Sen. Cannon). Left unchecked, "rapid population growth and accompanying commercial and residential development * * * posed a serious threat to the Lake Tahoe Basin's fragile ecology." S. Rep. 91-510, *supra*, at 5; H.R. Rep. No. 91-650, *supra*, at 4.

"Ominous signs of water pollution [were] becoming all too evident. * * * Tree removal, excavations, highway

construction, landfill, and other development activities ha[d] scarred the basin slopes and triggered destructive erosion." S. Rep. 91-510, *supra*, at 5. The water quality of the Lake was dramatically decreasing. The eutrophication process was accelerating. The clarity of the water was itself decreasing by over half a meter a year. Tahoe stood "in grave danger before a mounting wave of population and development" (*Younger v. El Dorado*, 5 Cal.3d 480, 486, 487 P.2d 1193, 1195, 96 Cal. Rptr. 553, 555 (1971)), which threatened both economic and ecologic collapse.

b. The Tahoe Regional Planning Agency and the Tahoe Regional Planning Compact: Nevada and California responded to the emerging crisis by entering into the Tahoe Regional Planning Compact, which Congress approved in 1969 as an interstate compact pursuant to the Compact Clause, U.S. Const. art. I, § 10, cl.3. See Pub. L. 91-148, 83. Stat. 360 (1969). The purpose of the legislation was to create a single bi-state agency, the Tahoe Regional Planning Agency (TRPA), empowered to craft a unified development plan for the entire region. The TRPA is neither a federal agency nor "an arm of the State subject to its control." See *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979). The TRPA is instead akin to a "political subdivision" of two states, "comparable to a county or municipality," which "exercise[s] a 'slice of state power.'" *Id.* at 400.

The TRPA adopted a regional plan in 1972, which called for more stringent limitations on development including on those parcels, such as SEZs, most likely to result in significant degradation of Lake Tahoe's waters. But these early planning efforts were largely ineffective due to structural problems in the 1969 Compact that limited TRPA's ability to prevent harmful development. See Gary A. Owen, Tahoe Regional Planning Agency, California Envt'l Law &

Land Use Practice, § 64.04[6], pp. 64-18 to 64-19 (1990).

Lake Tahoe's problems worsened during the 1970s, as documented by a series of federal, regional, and state environmental studies. A 1974 TRPA report identified development in SEZs as a major source of the Lake's problems. An United States Environmental Protection Agency report recommended the development and establishment of enforceable standards for the protection of Lake Tahoe -- referred to as "environmental thresholds" -- to control growth, which had been missing from the 1969 Compact. Strong, *supra*, at 173, 184-185. By 1980, water quality in the Lake was rapidly declining; eutrophication was increasing; and, water clarity had decreased between 6-13 percent in the preceding 15 years. *Id.* at 186-187.

California and Nevada responded to the deepening crisis by amending the 1969 Compact, which Congress approved in 1980. Pub. L. 96-551, 94 Stat. 3233 (1980). Congress found that the "waters of Lake Tahoe * * * are threatened with deterioration or degeneration, which endangers the natural beauty and economic productivity of the region." 1980 Compact, art. I(a). The 1980 Compact significantly strengthened and broadened the powers of the TRPA. See arts. III(g), V(b), V(c), V(g), VI(a)&(b). The 1980 Compact also required the TRPA to enact a binding plan that barred any development that failed to contribute to attaining or maintaining specific "environmental threshold carrying capacities." *Id.* arts. I(b), V(b), V(g).[4]

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[4] "'Environmental threshold carrying capacity' means an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety within the region. Such standards shall include but not be limited to standards for air quality, water quality, soil conservation, vegetation preservation and noise." 1980 Compact, art. II(i).

c. The 1987 TRPA Plan: Pursuant to the 1980 Compact, the TRPA adopted environmental threshold carrying capacities for the Tahoe Region in 1982 and a new regional plan in 1987.[5] The 1987 TRPA Plan resulted from several years of "Consensus Building Workshops" in which conservation and property rights interests, federal, state and local government representatives, utilities, and other community and business interests met to discover common ground. See Owen, *supra*, at § 64.06[3], p. 64-31; I TRPA 208 Plan, *supra*, at 3. Based on those workshops and the resulting recommendations, the TRPA developed "Goals and Policies" in 1986 and a comprehensive "Code of Ordinances" in 1987. *Id.*

Fundamental to the 1987 TRPA Plan is the requirement that development restrictions "must contribute to attaining or maintaining" the "environmental thresholds" required by the 1980 Compact. TRPA Code § 6.3. The TRPA, accordingly, must disapprove any project inconsistent with that requirement. *Id.*

One way that the 1987 TRPA Plan seeks to attain the environmental threshold relating to Lake Tahoe's water quality is by restricting existing and future residential,

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[5] The TRPA first issued a new regional plan in 1984, but a federal district court enjoined its implementation after only three days in response to a lawsuit brought by the California Attorney General and an environmental organization. The court agreed with the plaintiffs that the 1984 plan failed to meet the 1980 Compact's strict environmental requirements of enforceable "thresholds." See *People of the State of California v. Tahoe Regional Planning Agency*, Nos. S-84-0561-EJG (E.D. Cal. June 15, 1984), aff'd, 766 F.2d 1308 (9th Cir. 1985). The practical effect was a moratorium on all development, except pursuant to case by case judicial review, until 1987, when TRPA promulgated the 1987 TRPA Plan, which is the subject of this litigation. Adoption of the 1987 TRPA Plan led to settlement and dissolution of the injunction.

commercial, and tourist accommodation development in the Tahoe Basin. See generally, Rachelle J. Nicolle, *Seeing Pebbles At Eighty Feet - The Tahoe Regional Planning Agency*, Land Use & Environment Forum, 17-18 (Summer 1996). With regard to future residential development, in particular, the plan seeks to accomplish three major objectives: (1) to place a ceiling on the total amount of residential development that may occur in the Basin; (2) to control the pace of development by limiting the number of building permits that may be issued each year; and (3) to limit the amount of impervious coverage resulting from permitted development. A major tool for achieving the water quality goal is prohibiting further development in SEZs.

Eligibility of a particular parcel for future residential development turns on an assessment of the physical suitability of the parcel for such development. To build a single family home or other residential unit, a property owner must have three rights: a "residential development right," a "residential allocation," and "land coverage."

A "residential development right" represents the right to have a residential unit on an eligible parcel of land. A "residential allocation" is necessary to construct a residence in a specific calendar year. "Land coverage" is the maximum percentage of impervious coverage of the surface allowed. These three property interests correspond to the 1987 Plan's objectives of limiting long term residential development, the annual pace of that development, and the amount of impervious coverage.

Although each private owner of a vacant residential parcel automatically receives one "residential development right" (TRPA Code § 21.6.A), entitlement to a "residential allocation" and to "land coverage" turns primarily on an individual assessment of the parcel's suitability for

development. Each parcel receives a numeric score -- Individual Parcel Evaluation System (IPES) -- that reflects the predictable effect of the parcel's development on the water quality of the Lake. TRPA Code Chap. 37. The IPES score determines the "land coverage" assigned to that parcel. TRPA Code §§ 20.3.A(4), 37.11. The IPES score is also relevant to the parcel's eligibility for receiving a "residential allocation" in a specific calendar year. *Id.* § 37.8.

There are a total of 300 residential allocations available each year in order to control the pace of development. TRPA Code § 33.2.A(3). Only parcels with a certain minimum score are eligible for development in a given year. *Id.* § 37.8.E The minimum score may decrease over time if certain conditions are met. *Id.* § 37.8.C. A "stream environment zone" (SEZ), however, receives a score of zero and is ineligible for residential development at any time. *Id.* § 20.4.3.

The 1987 TRPA Plan combines development restrictions with significant property rights enhancements designed both to achieve a more equitable sharing of the burdens and benefits resulting from the restrictions and to steer residential development to the most physically suitable locations. Every property owner is allowed to sell certain transferable development rights (TDRs) to owners of other eligible properties. There are three potentially transferable development rights: residential development rights; residential allocations; and land coverage. A property owner may sell his "residential development right." A likely purchaser of such a right would be an individual who wants to have more than one residential unit on his property. *Id.* §§ 21.6.C, 34.2. A property owner may also be eligible to sell

or otherwise transfer his "residential allocation." *Id.* § 34.3.[6] Finally, the owner may sell whatever "land coverage" to which the owner is entitled to another eligible landowner. The purchaser of that land coverage would, based on that purchase, have the right to undertake a development project requiring more land coverage than he was initially assigned under the plan. TRPA Code § 20.3.C. The seller of such development rights must record deed restrictions on his land notifying all that such rights no longer pertain to his parcel. *Id.* §§ 20.3.C(7), 34.2.B, 34.3.G, 34.5.

A property owner whose parcel of land is determined to be entirely SEZ property receives an IPES score of zero. TRPA Code § 37.4.A(3). That land is not eligible for residential development. With a few exceptions, SEZ property cannot be used for the construction of permanent structures because of the adverse impact of such development on the water quality of Lake Tahoe. *Id.* § 20.4.B.

Just like other private owners of vacant residential lots in the Basin, however, the owner of SEZ property may sell the TDRs that arise out of his ownership of his parcel, including land coverage, residential development right, and residential allocation, to another. TRPA Code §§ 20.3.C, 34.2, 34.3. In addition to the one residential development right to which each private owner of vacant residential property is entitled, the owner of an SEZ property may earn up to three *additional* residential bonus units. The owner

[6] A property owner whose IPES score is below the minimum for that year may nonetheless possess a valuable residential allocation that he may sell. *Id.* §§ 33.2.B, 34.3. Approximately ten percent of new residential allocations (30 out of 300) are reserved each year for distribution to owners of parcels with IPES scores below the minimum that year. *Id.*; see J.A. 145-146. Those who apply and receive the allocation may sell or otherwise transfer that right for use on another eligible parcel during the relevant calendar year.

earns and is assigned those units upon TRPA approval of the sale or transfer of his initial residential development right. *Id.* §§ 35.2.C, 35.2.D(4).[7] The bonus units provide mitigation for the stringent development restrictions applicable to the land itself. Many owners of SEZ property have successfully obtained and sold bonus units. See J.A. 148.

The owner of SEZ property also receives land coverage rights equal to one percent of his land. TRPA Code § 37.11.B(1). The relatively low land coverage percentage reflects the environmentally sensitive character of the land upon which the percentage is based. *Id.* § 37.11.A. Finally, the SEZ owner may apply for a residential allocation in any particular year and, if awarded an allocation, sell it for application to an eligible property in the Basin. *Id.* § 33.2.B.[8]

2. Proceedings Below

1. In 1972, petitioner and her husband purchased her lot in the Mill Creek Estates Subdivision located in Incline

[7] Contrary to petitioner's claim (Br. 6), the "bonus units" are neither unlimited or arbitrary. The plan limits the number of bonus units at 1,600. TRPA Code § 35.2.A.

[8] Property owners, including owners of SEZ parcels, with lower than the minimum IPES score required for development first became eligible to compete for residential allocation in 1993. See J.A. 145-146; note 6, *supra*. During that year, 30 parcels out of a total of 400 eligible in Washoe County competed for six allocations. *Id.* at 146-147. Because an owner of SEZ property who does not receive an allocation one year may reapply in succeeding years, the possibility of receiving an allocation over several years approaches 100 percent. See Amicus Br. League to Save Lake Tahoe 21. Allocations for owners of SEZ property, therefore, can hardly be fairly characterized as "scarce" (Pet. Br. 5).

Village, Washoe County, Nevada. J.A. 2. Petitioner first applied to develop her property 17 years later in 1989. Pet. App. A6. A TRPA team of scientists had conducted a field inspection of her property under IPES to determine its suitability for residential development and concluded that it was an SEZ. Pet. App. A6; see TRPA Code § 37.5.[9] The team based its determination on the nature of the vegetation on the property, the evidence of near surface groundwater on the site, and the adjacency of the parcel to Mill Creek, which runs along the border of petitioner's land to Lake Tahoe.[10]

The TRPA, accordingly, assigned the property an IPES score of zero, which petitioner appealed. In response to her appeal, a different TRPA team of scientists examined the physical characteristics of her property. Because they confirmed the conclusions of the first investigators, the TRPA denied petitioner's appeal of the SEZ determination and of her IPES score. Pet. App. A6; see note 10, *supra*.

2. Petitioner subsequently filed in federal district court this regulatory takings claim against the TRPA, alleging that, as applied to her property, the TRPA Ordinances constituted a taking of private property requiring the payment of just

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[9] Petitioner asserts (Br. 2 n.1) that her property "was assigned a rating of six on th[e] seven point system" used to determine land's suitability for development at the time of her purchase. TRPA believes that her land was classified as an SEZ under the seven point system referred to in her complaint. A TRPA Ordinance adopted several months prior to her purchase limited land coverage on SEZ property to one percent coverage except in limited circumstances. In all events, this disputed factual issue would be for the trial court's resolution once petitioner's takings claim is ripe.

[10] C.A. Rec. Item #68, Attachment, pp. 1-2 (Memorandum to Governing Board from Agency Staff of TRPA, re "Request for Hearing of IPES Score: Suitum, APN 130-211-31 (8/5/90)).

compensation under the Fifth Amendment. J.A. 1-6.[11] She based her takings claim on her allegation that the TRPA Ordinances deprived her of all economically viable use of her property. J.A. 3. Prior to the filing of her lawsuit, petitioner did not attempt to sell or to obtain TRPA approval of a transfer of her TDRs, including her land coverage, residential development right, or any bonus residential development units. Pet. App. A6.

3. The district court dismissed the complaint for lack of ripeness. Pet. App. C1-C5. Prior to ruling on the ripeness issue, the district court provided the parties with an opportunity to file a brief specifically addressing the relevance of her TDRs to the ripeness of her claim. Petitioner contended that her takings claim was ripe because TDRs were an "absurd avenue," a "ruse," a "false illusion" that had "produced no sales," and that the TRPA Ordinances lowered her property value to a "negative number." Plaintiff's Response to Defendant TRPA's Memorandum Concerning Transfer of Development Rights, 2 (C.A. Rec. Item #77). The TRPA responded by contending that TDRs possessed substantial market value, based on past market transactions. J.A. 93-95. Both petitioner and the TRPA supported their positions on TDR value with affidavits. *Id.* at 123-143.

The district court concluded that petitioner's takings claim was not ripe for adjudication. The court reasoned that because "transfer rights are significant to the takings calculus," "until values attributable to the transfer program are known, the court cannot realistically assess whether and

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[11] Petitioner also apparently raised substantive due process and equal protection claims (Pet. App. A4, D1) in her complaint. See J.A. 4-5. The petition for a writ of certiorari, however, is confined to the ripeness of her regulatory takings claim.

to what extent TRPA's regulations have frustrated plaintiff's reasonable expectations." Pet. App. C3, C4. The court agreed with the TRPA that "there is significant value in the transfer of residential development rights and transfer of residential allocations which plaintiff may be entitled to." *Id.* at C3.[12] "The finality, in terms of allowed use of the property, may only be determined after plaintiff applies to transfer her development rights." *Id.* at C3.

4. The court of appeals affirmed. Pet. App. A1-A12. The court concluded that "[w]ithout an application for the transfer of her development rights," a court "cannot know the regulation's full economic impact or the degree of the interference with [petitioner's] reasonable investment-backed expectations." *Id.* at A9. The court rejected petitioner's claim that the TDR program was a mere "ruse" or "sham," and upheld the trial court's finding that there is "significant value in the transfer of residential development rights and transfer of residential allocations." *Id.* at A10. For those same reasons, the court rejected petitioner's contention that any effort she might make to transfer her TDRs and seek TRPA approval of such a transfer would be "futile." *Id.* at A11.[13]

SUMMARY OF ARGUMENT

1. The lower courts reasonably applied prudential ripeness doctrine in dismissing petitioner's regulatory takings claim. Prudential ripeness turns on consideration of "the

[12] The district court excluded the affidavit supplied by petitioner's "expert" on the ground that it lacked the necessary indicia of reliability and credibility for admission into evidence. Pet. App. C2 n.1

[13] The court of appeals also affirmed the district court's exclusion of the affidavit submitted by petitioner in support of its ripeness claim. Pet. App. A11. Petitioner did not seek review of that fact-bound ruling in her petition.

fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Both factors support the judgment that ripeness is lacking.

a. The "fitness of the issue" for adjudication necessarily depends on the "issue" being raised. The merits of petitioner's as-applied regulatory takings claim turn on the "economic impact" of the regulations that she challenges and, even more specifically, on the assessment of her extreme factual allegation that her TDRs are utterly without economic value. The district court reasonably concluded that a claim based on such extreme factual allegations would be "fit" for adjudication after petitioner had sought to market and transfer her TDRs. Then, the court could decide how robust a market exists for TDRs and their approximate market value, based on petitioner's actual marketing efforts. The court's determination, understood in light of petitioner's specific claim, was entirely reasonable.

b. The "hardship" to petitioner of requiring her to take the minimal steps necessary to assist the district court's determination is not substantial. Petitioner could have satisfied the district court by taking modest steps through reasonably available procedures to ripen her claim and render her extreme factual allegations more susceptible to judicial evaluation. Nothing in the TRPA TDR program remotely supports the chorus of loud complaints of overwhelming hardship and burden directed at it by petitioner and her supporting amici. Indeed, there are both distinct advantages to petitioner of postponing adjudication and disadvantages to the TRPA of doing so.

2. Before this Court, petitioner seeks to attack the lower court's judgment by dramatically recharacterizing her ripeness argument. In the lower courts, petitioner's primary

argument was that her claim was ripe because the TDRs lacked any economic value. Petitioner now adds two additional arguments. Neither, even if timely, possesses merit.

a. Petitioner's first new argument is that whatever positive value her TDRs possess is susceptible now to judicial resolution. Petitioner's new argument raises a narrow, close question. But petitioner offers no persuasive reason to disturb the district court's determination that it could best evaluate the "economic impact" of the restrictions petitioner challenges after petitioner had taken reasonable steps to market her TDRs and seek TRPA approval of their transfer. The further development of the factual record pertaining to the economic impact of the development restrictions would render petitioner's taking claim significantly more "fit" for judicial determination. And the hardship of postponing adjudication until then remains relatively insignificant.

b. Petitioner's second new argument likewise lacks merit, but it is far more extreme in its reach. Petitioner broadly challenges the relevance of the value of TDRs to the constitutionality of TRPA's restrictions on development. According to petitioner, TDR value is irrelevant to the question whether a taking of property has occurred.

Petitioner, in effect, invites this Court to overrule its decision in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), which squarely held to the contrary. In *Penn Central*, the Court held that TDRs are relevant to the question whether a regulatory taking has occurred because they mitigate the economic impact of development restrictions. Amazingly, however, petitioner does not cite *Penn Central* even once in her brief. Yet, while ignoring applicable Court precedent, petitioner recklessly calls into

question the constitutionality of a host of comprehensive land use plans throughout the nation, which, relying on *Penn Central*, utilize TDRs and other analogous property rights innovations to achieve a more equitable sharing of the benefits and burdens of development restrictions.

Nor do any of this Court's decisions, including *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), support petitioner's extreme view of a property owner's constitutional right to "use" land for developmental purposes, regardless of its retained economic value. This Court has consistently maintained in all of its regulatory takings cases, including *Lucas*, that the "economic impact" of a regulation is the relevant consideration in the takings inquiry. The Court has never intimated that there is a developmental "use" inquiry distinct from whether the property has retained market value. Instead, market value establishes economic use and the courts do not second guess the specific reasons why the market finds such value in the property. Where, moreover, as in this case, the regulatory regime that petitioner attacks includes both property right enhancements as well as restrictions, regulatory takings analysis requires consideration of the net "economic impact" of both the restrictions and the enhancements.

ARGUMENT

THE LOWER COURTS PROPERLY DISMISSED PETITIONER'S REGULATORY TAKINGS CLAIM BASED ON THE LACK OF RIPENESS

"[R]ipeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services*, 509 U.S. 43, 58 n.18 (1993), citing *Buckley v. Valeo*, 424 U.S. 1, 114 (1976) (per curiam). The prudential

dimension of ripeness stems from the justiciability doctrine and the judiciary's effort to limit its involvement where judicial review would be premature. See generally *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring); see *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 200 (1983). A central prudential ripeness concern is "the need to 'flesh out' the controversy" (*Catholic Social Services*, 509 U.S at 71 (O'Connor, J., concurring) to "present the constitutional issues in 'clean-cut and concrete form." *Renne v. Geary*, 501 U.S. 312, 321 (1991), quoting *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 584 (1947).

The lower courts in this case concluded that prudential ripeness concerns warranted dismissal of petitioner's as-applied regulatory takings claim. Petitioner challenges that judgment on three different grounds, only one of which served as the basis for her ripeness arguments in the lower courts. Because the lower courts reasonably applied prudential ripeness doctrine, this Court should reject all of petitioner's arguments, both old and new. The court of appeals' judgment, accordingly, should be affirmed.

A. Prudential Ripeness Concerns Support Delaying Adjudication of Petitioner's Regulatory Takings Claim Until She Has Taken Reasonably Available Steps To Develop The Factual Record Necessary To Evaluate The Merits Of Her Claim In A More Concrete Setting

Prudential ripeness "is best seen in a twofold aspect, requiring [the courts] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v.*

Gardner, 387 U.S. 136, 149 (1967). In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985), this Court concluded, consistent with *Abbott Laboratories*, that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Applied to the case at hand, both *Abbott Laboratories* factors similarly support the lower courts' determinations that petitioner's regulatory takings claim lacks prudential ripeness.

1. The merits of petitioner's as-applied regulatory takings claim turn on extreme factual allegations regarding the regulation's economic impact. The validity of these allegations would be significantly more "fit" for judicial decision after petitioner has made a meaningful effort to determine the regulation's actual impact on the market value of her property, including her TDRs, pursuant to TRPA procedures.

a. The ripeness of a regulatory takings challenge often turns on whether the challenge is facial or as-applied. The "critical" distinction between facial and applied takings claims is that the former asserts that the "mere enactment of a statute constitutes a taking" and the latter asserts "that the particular impact of a government action on a specific piece of property" constitutes a taking. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987). Because facial takings claims are, by their nature, less fact-dependent, the "predominately legal" issue they raise is more likely to be "fit" for judicial decision in the absence of further factual development. Cf. *Pacific Gas & Electric v. State Energy Resources Comm'n*, 461 U.S. at 201. But, for that same reason, a facial takings challenge, while ripe, is far less

likely to succeed on the merits -- the plaintiff is hardpressed to demonstrate the degree of economic impact necessary to establish that enactment of the regulation "goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); see, *e.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 493; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

Here, however, petitioner has brought an "as-applied" regulatory takings claim,[14] in which resolution of the merits of the claim "necessarily entails complex factual assessments of the purposes and economic effects of government actions." *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992); see *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413 ("the question depends upon the particular facts"). In as-applied takings cases, the "very nature of the inquiry required by the Just Compensation Clause" -- *i.e.*, the "'essentially ad hoc, factual inquir[y],' involved in takings analysis" -- renders the takings claim less fit for judicial resolution in the absence of a fully developed "factual setting." See *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. at 190; *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988), quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) and *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 294-295 (1981).

One of the factual inquiries of "particular significance" is "the economic impact of the particular regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central Transp. Co. v. City of New York*, 438 U.S. at 124. This "'ad hoc factual inquir[y]' must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the

[14] See, *e.g.*, Pet. Br. 4; Appellant Suitum Ct. App. Br. 2.

ique circumstances." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 295. "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986).

b. In this case, of course, we do know how far the regulation has "gone" in one respect. We know the full extent of the regulation's impact in restricting petitioner's development of her own land. The TRPA has finally determined that petitioner's land lies entirely within an SEZ; therefore, she cannot build a permanent residential structure on her parcel.

Petitioner is nonetheless mistaken in assuming that finality on that issue necessarily renders her takings claim ripe. In particular, petitioner misreads (Br. 13-15) the import of this Court's ruling in *MacDonald* that "an essential prerequisite" to maintaining an as-applied regulatory takings claim "is a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald*, 477 U.S. at 348. But the Court in *MacDonald* stated only that such a "determination" was "an essential prerequisite" for ripeness. The Court never intimated that it was the *exclusive* prerequisite for ripeness.

To be sure, in many instances, it may well be, because that is the only relevant determination of economic use to be made. But not so here, where there are determinations yet to be made regarding petitioner's utilization of aspects of her property other than her right to develop her own land. Indeed, *Abbott Laboratories* treated the finality of an agency's ruling as only one factor in its ripeness determination. 387 U.S. at 149. The Court also found significant that the petitioner was subject to immediate,

serious sanctions for disobedience and that the case presented only a "purely legal" issue for decision. *Id.* at 149, 153-54.

Here, the property right to build on the land itself is not the only property right arising out of her ownership of that land. The TRPA Ordinances grant her a further property right based on her land ownership that allows her to sever development rights from her land for sale and transfer to other parcels. Determination of the value of those severable property rights, a question of fact, therefore, becomes necessary to determine the "economic impact" on petitioner of the application of TRPA's Ordinances to her property. Where, as in this case, the challenged regulatory program includes both property rights restrictions and enhancements, a court's evaluation of the program's "economic impact" necessarily requires consideration of how both affect the market value of the owner's property.

Nor is it an open issue whether TDRs are relevant to the "economic impact" inquiry and to the question how far a regulation has "gone." In *Penn Central*, this Court squarely addressed that very issue. The Court held that "the [TDR] rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation." *Penn Central*, 438 U.S. at 137.

c. The district court in this case, therefore, acted, entirely reasonably, as did the court of appeals, in ruling that prudential ripeness concerns support delaying a judicial decision until the court had a more developed factual record of the value of petitioner's TDR property rights. The ripeness ruling was largely justified by the extreme nature of the factual allegation upon which petitioner based her takings claim.

What factual development and regulatory steps are required for ripeness turn not just on whether a regulatory takings claim is facial or, as here, as-applied, but also on the nature of the factual allegations upon which that as-applied takings claim is based. Here, petitioner argued in the lower courts that her takings claim was ripe because the entire TDR program was "a ruse, a sham," "a false illusion," and "an idle futile undertaking" that "has produced no sales." See Appellant's Ct. App. Br. 20, Appellant's Ct. App. Rep. Br. 4. She argued that her property "has no economic value" and the TRPA has "reduced the value of her property not to zero, but to a negative number." Appellant's Ct. App. Br. 20; Appellants Ct. App. Rep. Br. 2. Indeed, these extreme and unsubstantiated factual allegations were essentially the exclusive basis upon which petitioner argued that her claim was ripe in the lower courts.

In finding petitioner's taking claim unripe, the lower courts effectively held that those extreme factual allegations were unhelpful for rendering her takings claim "fit" for judicial resolution. The courts understandably rejected her primary allegation, and then cautiously concluded that the takings claim could best be adjudicated after petitioner had pursued steps reasonably available to try to market and transfer her TDRs. Petitioner's unilateral charges of "negative" value did not provide a reliable basis upon which to dispose of the case. The court reasoned that "until values attributable to the transfer program are known, the court cannot realistically assess whether and to what extent TRPA's regulations have frustrated plaintiff's reasonable expectations." Pet. App. C4.

d. The district court, moreover, provided petitioner with a threshold opportunity to support her extreme factual claim and the TRPA with an opportunity for refutation. The result is telling. Petitioner proffered a supporting affidavit that the

district court excluded from evidence because of the absence of the necessary minimum indicia of credibility. (The court of appeals affirmed that exclusion, which petitioner does not challenge before this Court).[15] There was consequently no admitted evidence supporting petitioner's extraordinary charges.

There was, by contrast, substantial admitted evidence that petitioner's factual claims lacked validity. The trial court admitted into evidence an affidavit of an expert submitted by the TRPA. That expert's affidavit described numerous sales of TDRs in the Tahoe Basin at significant prices. See J.A. 123-132, 139-143. Relying on the TRPA expert, the district court concluded that "there is significant value in the transfer of residential development rights and transfer of residential allocations which plaintiff may be entitled to." Pet. App. C3.

Because petitioner has not challenged the correctness of the lower courts' factual findings or their exclusion of petitioner's "expert" evidence, this Court must likewise reject any claim of ripeness petitioner makes based on an allegation

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[15] The district court pointedly excluded from consideration the only evidence that petitioner had presented - an affidavit filed by petitioner's "expert" -- in support of her otherwise conclusory allegations regarding the TDR program and the impact of the application of the TRPA Code to her property. The court concluded that "affidavit * * * is inadequate under FRCP 56(e)" because "[t]here is no showing that Mr. Kaleta is an expert" with the "knowledge, skill, experience, training or education which would qualify him to testify * * * as to the valuation of the development rights with which this Court is concerned." Pet. App. C1 n.1. The court of appeals affirmed the exclusion of petitioner's only evidence in support of her allegations regarding the TDR's lack of any value and the sheer futility of utilizing the TRPA TDR procedures. See *Id.* at A11 ("Given that Suitum's development rights possess some significant value, Suitum fails to meet her burden of showing that participation in the TDR program is futile."). See notes 12 & 13, *supra*.

that her TDRs lack all economic value. It is simply too late in the day for petitioner to insist on a factual premise that, when provided with a meaningful opportunity, she failed to support in the lower courts. Cf. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *United States v. Ceccolini*, 435 U.S. 268, 273 (1978).

2. The second *Abbott Laboratories* factor -- "the hardship to the parties of withholding court consideration" -- is equally supportive of the lower courts' rulings on ripeness. 387 U.S. at 148-149. The district court is requiring petitioner to take only the minimal steps necessary to make a good faith effort to find an interested purchaser of her TDRs and to seek the TRPA's approval of the transfer.

a. Petitioner and her supporting amici launch a series of hyperbolic rhetorical attacks on the extraordinary burden this would place on petitioner.[16] Stripped of their exaggerated rhetoric, however, nothing remains. Neither petitioner nor any of her amici can offer any support for their claim of undue burden.

TRPA procedures for seeking out a purchaser and transfer approval are not burdensome. "[N]o irremediable adverse consequences flow from requiring a later challenge."

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[16] See, *e.g.*, Pet. Br. 11, 12 ("no limit to the number of irrelevant and unavailing procedures" and "an infinite array of trivial and time consuming administrative procedures"); Amicus Br. Institute for Justice 5, 7 ("require multiple forms and complicated negotiations" and "endless procedural hurdles"); Amicus Br. American Farm Bureau Federation, et al., 8, 23 ("insurmountable and interminable," "intricate and unwieldy TDR scheme," and ("incredibly burdensome procedural rules"); Amicus Br. Tahoe-Sierra Preservation Council, Inc., 5 ("labyrinthian new TDR maze"); Amicus Br. of The Mayhews, et al., 8 ("Sisyphean endurance course of multiple applications for development permission and of useless and futile acts").

Cf. *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 164 (1967). Nor is this a circumstance where "delayed resolution of these issues would foreclose any relief from the present injury suffered by appellees." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 82 (1978). Just compensation is the remedy for governmental takings. That remedy will be equally available in the future.

Petitioner also wrongly assumes (Br. 10, 27) that TRPA maintains that a ripe regulatory takings claim requires a consummated sale and a relinquishment of all property rights. There is no requirement that petitioner in fact sell her TDRs. If she did sell her TDRs, then her claim would most certainly be ripe. But, her regulatory takings claim *does not require* a consummated sale to be ripe.

Petitioner's contrary view derives from her erroneous equation of TRPA approval with a final sale. TRPA's approval of a specific transfer to eligible property makes a subsequent sale possible. It remains, however, for the property owner then to decide whether to complete the sale. Because a TRPA approval is effective for as long as three years (TRPA Code § 4.9), the property owner has substantial time to make a decision.[17]

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[17] For these same reasons, petitioner is mistaken in claiming (Br. 32) that she must formally record a permanent restriction on all development on her parcel to make her takings claim ripe. The approval is instead made conditional on that subsequent event, which for transfer of residential development rights may occur anytime within three years of the conditional approval. See J.A. 99. For transfer of a residential allocation from an SEZ property, however, the transferor has only until the close of the calendar year to satisfy the condition. See TRPA Code § 33.2.B. The recordation requirement protects subsequent parties considering purchasing land or TDRs by notifying them which rights have been severed and conveyed, and is no different in principle from recording requirements for easements and servitudes.

Nor, does the TRPA claim that a regulatory takings claim would never be ripe until such TRPA approval was sought and obtained. TRPA has readily acknowledged that petitioner's takings claim could be ripe short of such approval. Consistent with ripeness' concern about "hardship to the parties," TRPA readily acknowledged in the lower courts that petitioner need only make a "good faith" effort to sell or otherwise transfer her TDR rights and obtain TRPA approval of a transfer. See Ninth Circuit Oral Argument Tr. 15-16, *Suitum v. TRPA*, No. 94-15768 (argued Nov. 13, 1995).[18] In the context of TDRs, there is no rigid ripeness

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[18] THE COURT: How long does she have to wait to determine whether she will try to go through that process, will it go on forever?

MR. SUSICH: No. We think that Mrs. Suitum certainly has to make a good faith effort to transfer those rights.

See Ninth Circuit Oral Argument Tr. 15-16, *Suitum v. TRPA*, No. 94-15768 (argued Nov. 13, 1995). The Ninth Circuit makes available audio recordings of its oral arguments. In this case, petitioner arranged for a formal transcription of the recording, which she relied upon in seeking rehearing before the court of appeals. A copy of the transcript has been lodged with this Court.

Of course, although a property owner's good faith effort to sell her TDRs could establish ripeness, neither the particular offers she obtained nor the absence of an offer, if that occurred, would conclusively establish the relevant market value for regulatory takings purposes once the case was ripe for adjudication. A specific bona fide offer or offers to purchase, or the absence of any offers, would be significant evidence for the judicial factfinder's consideration. But the factfinder would not be confined to such evidence in determining the "economic impact" of the challenged regulation. A contrary, inflexible evidentiary rule would not serve the interests of either the property owner or governmental agency, or of the court.

requirement of final TRPA approval, let alone a requirement of a final, consummated sale.[19]

Although the lower courts, in response to petitioner's extreme and unsubstantiated factual allegations, stated that her claim would not be ripe until she had obtained TRPA approval, we do not read those courts as having held that TRPA approval would be required in all cases for prudential ripeness. The courts had no occasion to address which lesser steps by a landowner would ripen a claim, because they were faced only with petitioner's categorical allegations and complete inaction. And, while we do not believe that a rigid ripeness requirement is needed in the TDR context, there are certainly advantages to litigants and to the courts from the lower courts' clear rule of finality, which makes plain one way to ensure ripeness.

b. Indeed, there are distinct *advantages* to petitioner in attempting to obtain approval of a specific transfer of her

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[19] Contrary to petitioner's intimation (Br. 27-28), her regulatory takings claim would most certainly not have been rendered moot by her mere application to transfer her TDRs. The application and its approval do not, by themselves, eliminate any of her property interests (see page 26, *supra*). Indeed, her claim would not be moot even after she sold her TDRs and recorded a permanent restriction on development. Any economic injury would remain, as would a court's ability to provide any relief mandated by the Just Compensation Clause. The TRPA's ability to minimize the monetary remedy could, of course, have changed. In some circumstances, the TRPA would retain the option of lifting the development restriction and pay just compensation for any temporary taking, but in some cases that might not be an option. Even so, that imposes no hardship on petitioner. Any hardship is on the TRPA, which has sole authority to make the remedy selection determination under this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987). In all events, petitioner has no complaint and mootness is not at issue. There is no "Catch-22" here. Pet. Br. 28.

TDRs before a decision on the merits of her takings claim. Property owners sometimes have complained that the problem with innovative property rights like TDRs is that their market value may be uncertain until the market becomes fully developed and settled. See Amicus Br. Institute of Justice 6, 18 ("difficult to value" and "value that inheres in them is rendered highly uncertain by the nature of the right"). By making a meaningful good faith effort to obtain TDRs, receive an offer for their sale, and seek the TRPA's approval of the transfer, petitioner can have the merits of her takings claim judicially resolved based on actual offers to purchase. Petitioner would not have to enter into speculation regarding only hypothetical offers based on sales of other property.[20]

For that same reason, there are distinct disadvantages to the TRPA from the lower courts' ripeness rulings. Based on the existing record, the more weighty evidence -- indeed only admitted evidence -- before the trial court demonstrated that petitioner's TDRs possessed substantial economic value. Had, therefore, the merits been litigated based on the evidence then before the Court, petitioner's takings claim undoubtedly would have failed. The TRPA nonetheless agreed with the courts below that, on balance, prudential concerns tipped the scale against review of petitioner's as-applied takings claim in light of the undeveloped factual record before the court.

Finally, petitioner's claim of hardship is unpersuasive because she failed even to undertake a minimal effort to obtain and sell or otherwise transfer her TDRs. Absent that

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[20] Unlike petitioner, her own supporting amici apprehend the resulting advantage to her. See Amicus Br. The Mayhews, et al. 5 ("It may be that Mrs. Suitum is ill-advised to proceed in the face of the unresolved factual matter of the potential value of TDRs.").

effort, any claims she might make that the applicable procedures are unduly burdensome has a "particularly hollow ring." Cf. *Penn Central*, 438 U.S. at 132. Had petitioner chosen simply to follow the district court's guidance rather than pursue this lengthy appeal, her takings claim would have become ripe several years ago.

B. Likewise Lacking In Merit Is Petitioner's New Argument That Her Regulatory Takings Claim Is Ripe Because, According to Petitioner, Any Positive Market Value Possessed By Her TDRs Can Now Be Judicially Determined

Petitioner, understandably, seeks to distance herself from the extreme factual allegations that prompted the lower courts to reject her complaint on prudential ripeness grounds. She now posits a factual allegation directly contradicted by her factual allegations in the lower courts: whatever positive value her TDRs possess is susceptible to judicial resolution now through "ordinary appraisal methods" (Pet. Br. 25).

Of course, because petitioner never made such an argument before the district court, the lower courts never had an opportunity to consider this ripeness issue and the merits of the new factual allegation upon which it is based. Because "[o]rdinarily, this Court does not decide questions not raised or resolved in the lower courts," the Court should reject petitioner's argument for this reason alone. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam). But, in all events, petitioner's new ripeness claim, like her previous one, lacks merit because the value of further factual development is considerable and the hardship to the parties remains minimal. See pages 22-23, 25-28, *supra*.

To be sure, in most contexts, no further steps would be necessary to develop the necessary factual record where, as has occurred in this case, the governmental agency has reached a final decision regarding the extent of development permitted on a particular piece of land. Expert appraisal testimony would, standing alone, be sufficient to determine market value. TDRs in the Tahoe Basin are, however, a sufficiently new property right that it is prudent for a reviewing court to seek to determine their market value based on more reliable evidence of their market value.

The advantages for the reviewing court are considerable where, as here, a market is emerging in a newly-created property right. The court can minimize judicial speculation and avoid substituting its judgment for that of the market place. The factfinding tribunal can rely on some of the best evidence available of actual market value -- the market itself.

The TRPA, moreover, provides a procedure for individuals like petitioner to obtain their full panoply of TDR property rights -- land coverage, residential development right, bonus residential development rights, and residential building allocation -- and to have their transfer approved. A property owner who follows the available TRPA procedures provides a reviewing court with a concrete factual record upon which the court can determine the economic impact of the TRPA's program and thus the merits of a regulatory takings claim. Absent, significant hardship -- and conclusory allegations aside, petitioner has shown none -- a trial court is well within the province of reasonableness in deciding to decide a regulatory takings claim based on a more complete factual record.

C. This Court Should Reject Petitioner's New Contention That Her Takings Claim Is Ripe Because, According to Petitioner, Her TDRS Are Not Relevant To Judicial Consideration Of The Merits Of Her Takings Claim Regardless of Their Economic Value

Finally, petitioner argues (Br. 18-23, 30-34) that her takings claim is ripe because the value of her TDRs are wholly irrelevant to the merits of her claim. According to petitioner, the taking issue turns exclusively on the developmental uses to which she can herself put her lot. Neither the economic value of her parcel, as restricted, nor of her TDRs plays any role in the constitutional equation. No matter what their value, her property has been "taken." According to petitioner, therefore, a court need not postpone resolution of the merits of petitioner's takings claim until the value of her TDRs are more "fit" for judicial resolution. Petitioner's final argument is even less persuasive than her prior contentions.

1. This Court's Settled Precedent Establishes That TDRs Are Relevant To Whether Property Has Been "Taken"

a. Somewhat astonishingly, petitioner neglects to discuss or even once to cite to a landmark decision by this Court that squarely contradicts her argument. In *Penn Central Transp. Co. v. City of New York*, this Court considered the relevance of TDRs in a regulatory takings claim. In particular, the Court considered whether the availability of TDRs was relevant to any one of the three factors the Court identified as "of particular significance" in resolving a regulatory takings claim: (1) the "character of the governmental action"; (2) the extent of any "interfere[nce]

with distinct, investment backed expectations"; and (3) the "economic impact" of the regulation. 438 U.S. at 124. The Court concluded that "the [TDR] rights * * * undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation." *Penn Central*, 438 U.S. at 137.

Hence, it is settled precedent that TDRs are relevant to the question whether a "taking" has occurred in the first instance. The value of TDRs is not relevant only to the secondary issue whether "just compensation" has been provided for "taken" property. Petitioner's total silence regarding *Penn Central* in her brief, extending to its very existence, speaks volumes about the extreme character of her final assertion of ripeness.

b. *Penn Central* is not, moreover, the only relevant decision of this Court inconsistent with petitioner's view that the "economic impact" inquiry is concerned only with the economic viability of developmental uses to which she may herself devote her own land. Her view would call into question a settled line of regulatory takings precedent both predating and subsequent to *Penn Central*. This precedent consistently focuses on the "economic impact" of the regulation,[21] particularly on any resulting diminution in the

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[21] See, *e.g.*, *Kaiser Aetna v. United States*, 444 U.S. at 174 ("economic impact"); *Hodel v. Irving*, 481 U.S. 704, 714 (1987) (same); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-225 (1986) (same); *Keystone Bituminous Coal Ass'n*, 480 U.S. at 495 (same); *Concrete Pipe & Prod. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (same).

market value of the regulated property.[22] As the Court unanimously held in *Concrete Pipe & Prod. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993), "'our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property'" (quoting *Keystone Bituminous Coal Ass'n*, 480 U.S. at 497).

Petitioner's contrary view rests on a fundamental misapprehension of this Court's invocation of the term "use" in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and in other regulatory taking cases. To be sure, those decisions discuss "use." But, in none of those cases, including *Lucas*, was this Court purporting to address the distinct legal issue petitioner attempts to raise for the first time in this case, which is whether a property owner has an inherent right to develop her land, regardless of its retained economic value. See Pet. Br. 9, 23.

Indeed, the clear assumption of the Court in all of its decisions is that no such distinction can be validly drawn. The Court never treats economic "value" as distinct from any particular "use." Instead, the Court treats the presence (or absence) of economic value as conclusively demonstrating that "economically viable use" remains (or has been eliminated). If there is a market value, then there is a "use" for takings purpose. Otherwise, presumably there would be no one willing to pay that price for the property. Courts do not undertake an independent inquiry into why the purchaser is willing to pay that amount. Why a purchaser finds market value is wholly irrelevant, as is the particular kind of use,

[22] See, *e.g.*, *Pennsylvania Coal v. Mahon*, 260 U.S. at 413 ("extent of the diminution"); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) ("a comparison of values before and after is relevant"); *Agins v. City of Tiburon*, 447 U.S. at 262.

developmental or otherwise, upon which the purchaser bases her willingness to pay.[23]

Not surprisingly, therefore, this Court's ruling in *Lucas* itself provides no support for petitioner's strained reading of that case. Although the Court referred to the deprivation of all "economically viable use," the Court simultaneously made plain that "use" turned on market value. The *Lucas* Court repeatedly referred to "value" and made clear that the total "diminution in (or elimination of) value" was the touchstone for its newly-formed *per se* takings test.[24] The Court

[23] For this reason, there is accordingly absolutely no merit to petitioner's assumption that there is no relevant "use" of property for purposes of takings analysis where the current landowner's best option is to sell the property to someone else, even if that person is willing to pay significant value for the property. Indeed, such potential "residual value" and its significant nature is not a matter of speculation either in Lake Tahoe or, as it happens, in this case. In this case, the district court specifically found that petitioner's land may retain "significant residual value" wholly apart from the value of her TDRs. Pet. App. C3. That judicial finding rested on respondent's expert testimony, based on past sales, of the significant market value of petitioner's property to neighboring owners desiring to expand their own lots around their homes. J.A. 123-132, 139-143. Nor is that finding surprising in the Tahoe Basin where the value to homeowners of a much larger lot size for recreational and aesthetic use would be considerable. See J.A. 149. The fundamental "right to exclude" is a valuable property right. *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 2316 (1994); *Kaiser Aetna v. United States*, 444 U.S. at 176. The court of appeals did not disturb that factual finding, the validity of which was likewise not questioned by the petition for a writ of certiorari. This case, accordingly, bears no relation in this respect to *Lucas v. South Carolina Coastal Council*, where the Court was faced with uncontroverted factual allegations that the restricted private land retained no residual economic value. See 505 U.S at 1022 n.9.

[24] See, *e.g.*, 505 U.S. at 1007 ("effect on the economic value"); *id.* at 1016 n.7 ("loss of value" and "diminution in (or elimination of) value"); *id.* at 1017 ("'[F]or what is the land but the profits thereof[?]'")

nowhere intimated that the property owner had a constitutional right to "the full exercise of the development rights inherent in the ownership of their property" (Pet. Br. 23).

In his separate concurring opinion, Justice Kennedy made even more explicit the equation between the "economically viable use" inquiry and the "economic impact" inquiry. He stated that the trial court finding of no economically viable use "appears to presume that the property has no significant market value or resale potential." 505 U.S. at 1033-34. Here too, the touchstone of the judicial inquiry is "market value," including "resale potential," which is completely inconsistent with petitioner's novel notion that the current owner of real property must be allowed to secure economic return by herself developing her land.[25]

c. Accordingly, in this case, petitioner's exercise of her TDRs is a "use" of her property for regulatory takings purposes. Petitioner is being allowed to "use" her property by severing her various rights to develop from her initial parcel and by selling or otherwise transferring them for application to a different parcel. See *MacDonald, Sommer*

(quoting 1 E. Coke, Institutes, ch. 1 §1 (1st Am. ed. 1812); *id.* at 1019 n.8 ("a complete elimination of value").

[25] In all events, petitioner's reliance on *Lucas* is misplaced as is her assumption (Pet. Br. 1) that her property lacks all economic value. As described in note 23, *supra*, and note 34, *infra*, the significant residual value her parcel currently retains, wholly apart from her valuable TDRs, takes petitioner outside the *Lucas* framework, which is triggered only by "a complete elimination of value." 505 U.S. at 1019 n.8 Petitioner's takings claim, therefore, would be subject to the takings framework this Court established in *Penn Central*, which includes "economic impact" as one of the distinct factual inquiries of "particular significance." *Id.*

& Frates v. Yolo County, 477 U.S. at 350; *Penn Central*, 438 U.S. at 137.

Petitioner is flatly wrong in suggesting that these TDRs are not property rights. If, as petitioner argues (Br. 19), that is the "most fundamental reason" for why petitioner's claim is ripe, then it is also a "fundamental reason" why petitioner is mistaken. A TDR arises out of an individual's ownership of land.[26] Under a state law, a TDR can be a property right with substantial economic value that can be bought and sold, taxed as property,[27] and, if condemned by the government, would require the payment of just compensation.[28]

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[26] Unlike petitioner, at least one of her amici recognizes that a state can permissibly make a TDR part "of her fee simple ownership." Amicus Br. Institute for Justice 2.

[27] See, *e.g.*, *Mitsui Fudosan (U.S.A.), Inc. v. County of Los Angeles*, 219 Cal.App.3d 525, 528, 268 Cal.Rptr. 356, 357-58 (1990) ("TDRs * * * are appropriately viewed as one of the fractional interests in the complex bundle of rights arising from the ownership of land[] * * * [and] are properly subject to taxation."); cf *Lorenc v. Bernards Township*, 5 N.J. Tax 39, 51 (1982) (rejecting real property tax valuation because "of taxpayer-expert's failure to give any consideration to the subject property's transfer development rights, he has not valued the total fee interest of the subject property").

[28] Petitioner asserts (Br. 9, 19) that a TDR is a mere "variance" for the purchaser rather than a property right sold by the seller. That a property right serves to lift a restriction that applies in the absence of that right does not render that right a mere variance rather than a property right. Indeed, the flaw in petitioner's reasoning is revealed by her own analogy (Br. 26-27) between TDRS and liquor licenses, which, when transferable, have long been treated as "property" in a variety of legal contexts, including bankruptcy. See *In re Farmers Markets, Inc.*, 792 F.2d 1400 (9th Cir. 1986); see also *Chicago Bd. of Trade v. Johnson*, 264 U.S. 1 (1924) (seat on exchange).

d. What the challenged Tahoe ordinances accomplish is a replacement of one property rights regime in a fragile ecosystem with another more suitable regime. The ordinances petitioner attacks, including the TDR program, establish a generally applicable system. They combine restrictions on future and existing development with property right enhancements that allow a landowner to sever his right to develop his property for application to another eligible parcel of land. The nature of the restrictions and enhancements that apply to a specific parcel of land turns on individual scientific assessment -- reflected in the IPES score (TRPA Chap. 37) -- of the relationship of the subject land to the maintenance of Lake Tahoe's fragile ecosystem.

The TDR program also *applies to all landowners in the Tahoe Basin*. It does not apply merely to those owners of SEZ property who are not permitted to build permanent structures on their own land. With limited exceptions, any landowner may sever his development rights from his property and sell or otherwise transfer them for application to another parcel of eligible property. See TRPA Code §§ 20.3.C, 34.2, 34.3. Landowners whose undeveloped land has a high IPES score may do so. So too may landowners with existing uses. By demolishing existing development, they may obtain another form of TDRs, including land coverage and units of use, which can then be sold and applied to other properties. TRPA Code § 20.3.C, 34.4. Indeed, the TRPA program is designed to provide those who own property with existing development with a substantial economic incentive to do just that. TRPA Code § 35.2.D(5).

For this same reason, there is absolutely no merit to petitioner's accusation (Pet. Br. 30), repeated by supporting amici (Amicus Br. American Farm Bureau Federation et al., 8), that TRPA enacted its TDR program as a "tactical ploy" to evade or otherwise render this Court's decision in *Lucas*

a "nullity." The TDR program existed before this Court's *Lucas* ruling as did longstanding, successful programs in many jurisdictions, including New York City, New Jersey, and Montgomery County. See Rick Pruetz, Putting Transfer of Development Rights to Work in California, 31 (Solano Press 1993); Amicus Br. National Trust for Historic Preservation; Amicus Br. Columbia River Gorge Comm'n, 12-15; Amicus Br. National League of Cities, et al.; Amicus Br. State of New Jersey.

e. In all events, it seems somewhat odd for petitioner to complain that government "subverts" *Lucas* when it seeks to diminish a regulatory restriction's adverse economic impact. *Lucas* was concerned with the rare, extreme case where a regulatory restriction deprives an owner of real property of all economically viable use. A regulatory program that creates rights that preserve economic value is not a subversion. It is an improvement upon the extreme facts of *Lucas*.

Nor, of course, does government avoid the Just Compensation Clause by not eliminating all economic value. A regulation that deprives a property owner of less than all economic value may still amount to a taking requiring just compensation. A court presented with such a case simply applies the analytical framework described in *Penn Central*, which includes consideration of the regulation's "economic impact." See *Lucas*, 505 U.S. at 1019 n.8.

Where, moreover, as in this case, the regulatory regime that petitioner attacks includes both property rights enhancements as well as restrictions, regulatory takings analysis requires consideration of the net "economic impact" of *both* the restrictions on "use" and the enhancements on "use." "[A] claimant's parcel of property [can] not first be divided into what was taken and what was left for the

purpose of demonstrating the taking of the former to be complete and hence compensable." *Concrete Pipe*, 508 U.S. 602, 644 (1993).[29] Just as the whole property affected by a regulation must be considered, so too must the whole bundle of rights held by the owner under the regulation be acknowledged. Certainly, the Fifth Amendment's bottom-line concern with ensuring "justice and fairness" does not support petitioner's claim that takings analysis should consider only the negative and none of the positive economic impacts. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (94) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

2. TDRs Are A Property Rights Enhancement That Furthers The Fifth Amendment's "Justice and Fairness" Concerns

Petitioner's mantra-like characterization of TDRs as "arbitrary" "administrative contrivances" (*e.g.*, Br. 19, 20) is completely misguided. TDRs do not subvert the Fifth Amendment. They promote the Fifth Amendment's justice and fairness goals by creating new private property rights that accomplish a more equitable sharing of the economic burdens and benefits that flow from protecting fragile natural resources upon which existing private property rights depend. See Amicus Br. Economist James Nicholas, et al.

a. Democratic majorities properly demand that government impose development restrictions necessary to

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[29] "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. *Penn Central Transportation Co.*, 438 U.S. at 130-131. This Court focuses rather on * * * the nature of the interference with rights in the parcel as a whole." *Id.*; see *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety").

achieve essential environmental protection goals. At the same time, TDRs reduce the windfalls and wipeouts that otherwise occur when all the burdens of developmental restrictions are absorbed by some landowners and all the benefits are enjoyed by others. They allow those whose property is restricted because of the property's physical characteristics to share nonetheless in some of the economic value preserved and generated by the environmental restrictions. TDRs also spur those whose property is least restricted to buy property rights from those whose property is most restricted. The net result is an emerging use of property rights and free exchange to promote more environmentally sensitive land use.

TDRs therefore reflect a revitalization and expansion of property rights. They do not suggest private property's erosion. TDRs create new property rights and protect and enhance the economic value of existing property rights by guarding against the destruction of common natural resources upon which existing private property rights depend. That is why state and local governments across the country have relied on this Court's ruling in *Penn Central* in using TDRs in their regulatory programs that restrict developmental activities that adversely affect the quality of natural resource commons upon which many property and community interests depend.

b. The role of TDRs in controlling development in Lake Tahoe reflects all of these advantages. The need for development restrictions derives from the unusual value and fragility of the Lake's ecosystem and the interdependence of land uses within the Basin. That is also why the most substantial restrictions on development apply to SEZ parcels of land. Uses of fragile properties can, as they do in Lake Tahoe, require heightened restriction. See *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) ("Coastal property may

present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit."); Richard Posner, Economic Analysis of Law, 60 (4th ed. 1992) (justifying heightened police power regulation of "interactive land uses").

The TRPA TDRs are in no sense "arbitrary" (Pet. Br. 21). Like the generally applicable development restrictions, each of the three TDRs directly relates to the Lake Tahoe Basin's distinct physical features and the need to coordinate the Basin's residential development. The number of "residential development rights" places a cap on long term residential development. The limited number of "residential building allocations" available each year dictates the pace of development. And the "land coverage" percentages govern the amount of impervious coverage resulting from future development in the Basin. See pp. 8-10, *supra*.

The TRPA TDRs also allow for a more equitable sharing of the burdens and benefits of development restrictions, including the restrictions on SEZ parcels. Owners of undeveloped SEZ parcels such as that owned by petitioner are the object of the greatest restriction, but they are not the only objects of restrictions. Property owners with lower IPES scores cannot develop their property until the minimum IPES score for residential development is lowered over time. See TRPA Code § 37.8.C. Existing development is likewise not immune from restriction. Expansion opportunities are limited and all landowners are subject to best management practice regulations that, for the protection of their shared ecosystem, restrict ongoing activities on their properties. See *id.* §§ 25.0-25.8.

But, even more importantly, by imposing restrictions on other parcels as well, the TRPA Ordinances confer

significant market value on petitioner's property, including her TDR property rights. See Amicus Br. League to Save Lake Tahoe 20-21. The TRPA TDR program, therefore, enhances the very "reciprocity of advantage" that this Court has long held relevant to mitigating the adverse distributional effects of land use restrictions.[30]

Petitioner herself enjoys that reciprocity of advantage. Both the significant value of her TDRs and the significant residual value of her land derive from the very restrictions that she challenges. Her TDRs are valuable because other property owners need to purchase them from her if they wish to develop their property more intensely. The restrictions, in effect, create a market for the TDRs. In addition, the value of all property in the Basin, including petitioner's land and TDRs, depends upon the high environmental quality of Lake Tahoe safeguarded by these development restrictions. See *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 139-140 (Rehnquist, J., dissenting) ("decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties").

c. Nor can petitioner fairly complain (Br. 2, 32) that the TRPA Ordinances unfairly single her out for harsh treatment because other parties have been allowed to build homes on their properties. All undeveloped SEZ residential property is treated alike under the TRPA ordinance.

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[30] See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415 ("secured an average reciprocity of advantage that has been recognized as a justification of various laws"); *Agins v. City of Tiburon*, 447 U.S. at 262 ("Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer.").

Petitioner is treated just like other owners of SEZ property.[31]

Petitioner's reliance on the fact that her neighboring properties have homes on them is likewise misplaced. Even assuming that some of those properties would be considered SEZ property, all of that residential development occurred before the current developmental restrictions were enacted. It is no offense under the Takings Clause that government would take a less restrictive approach to existing uses as compared to future or "contemplated uses." Cf. *Penn Central*, 438 U.S. at 125. Quite the opposite is true. That is precisely the distinction that the Takings Clause would support because the interference with existing uses would invariably present a more substantial interference with "reasonable investment-backed expectations." *Cf. Nordlinger v. Hahn*, 505 U.S. 1, 13 (1992) (quoting *Heckler v. Mathews*, 465 U.S. 728, 746 (1984)) ("'The protection of reasonable reliance interests is not only a legitimate governmental objective: it provides an exceedingly persuasive justification * * *'"). For these reasons, state zoning law has acknowledged a limited exception for existing, nonconforming structures and uses. See, *e.g.*, *City of Los Angeles v. Gage*, 127 Cal.App.2d 442, 274 P.2d 34 (1954).

d. Nor can petitioner find fault in the fact that not all undeveloped properties in the Tahoe Basin are similarly circumscribed in their development potential. To be sure, "[w]hen a property owner challenges the application of a zoning ordinance to his property, the judicial inquiry * * * will include consideration of the treatment of similar

[31] Approximately 9,200 acres of SEZ land is privately-held, or about 18% of all private land in the Basin. Just under 50% of that total (4400 acres) had been disturbed, developed, or subdivided by the mid-1980s. See III TRPA 208 Plan, *supra*, at 20.

parcels." *Penn Central*, 438 U.S. at 133 n.29; see *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1035-36 (Kennedy, J. concurring). But equal treatment of "similar parcels" is most certainly not a requirement that all parcels be treated equally regardless of their differences.

Under the TRPA Code, all parcels are subject to some developmental restrictions, and differences in degree are neither arbitrary nor discriminatory. The differences are reasonably based on differences in the physical characteristics of the individual parcels and, in particular, on the extent to which their development would affect adversely the water quality upon which they all ultimately depend. The TRPA Code both wisely accounts for these physical differences while seeking to reduce the disparity in positive and negative economic impacts through the TDR program.

Most simply put, the development restrictions on petitioner's parcel are substantial because the adverse impacts on Lake Tahoe of the physical spillovers caused by such development on SEZ land are substantial. Petitioner does not and cannot challenge in this Court the relevant "environmental thresholds" or the designation of her property as SEZ. Nor does she deny that residential development of SEZ properties would in fact result in substantial adverse effects on the Lake.

e. TDRs represent the kind of state and local property rights innovation that courts should encourage. Nature presented the TRPA with a daunting task in the Lake Tahoe Basin. At risk was the vitality of both economic and environmental interests dependent on the Lake's not being irremediably destroyed.

The TRPA developed the program that petitioner challenges based on years of negotiation and consensus

building workshops involving all interested parties. See page 7, *supra*. The carefully balanced regime of developmental restrictions and enhancements ultimately enacted represents a commendable, good faith governmental effort to develop an innovative program for reconciling the varied competing developmental and environmental interests in the Lake Tahoe Basin. Rather than being a mere "ruse" or "administrative contrivance" (Pet. Br. 5, 20, 30), the TRPA program represents the very kind of innovative and "novel social and economic experiment[]" that warrants heightened judicial deference and avoidance of judicial second-guessing in constitutional adjudication. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

That the innovations herein challenged are the product of a bi-state agency rather than "a single courageous State" (*id.*) renders them all the more warranting of judicial encouragement. Nevada and California overcame substantial political obstacles in jointly embarking on their cooperative effort to protect the interests of both of their citizens and the nation as a whole in Lake Tahoe. The kinds of compromises necessary to achieve the high level of interstate cooperation and sophisticated, coordinated planning efforts now implemented by the TRPA did not come easy. See S. Rep. 91-510, *supra*, at 5; Strong, *supra*, at 116-147; Comment, *The Future of a National Asset, supra*, 52 Cal. L. Rev. at 565-572; Comment, Gary J. Spradling, *Regional Government for Lake Tahoe*, 22 Hastings L. J. 705 (1971).

Petitioner's harsh characterization of the TDR program and the related development restrictions fails to appreciate the very real complexities government faces in regulating the exercise of private property rights mutually dependent on

preservation of a common natural resource, like Lake Tahoe.[32] No one's interest -- private property or otherwise -- is long served by a property rights regime that ignores nature's true complexity. "'"Property" * * * relate[s] to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.'" *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972), quoting *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting); see *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) ("The Takings Clause does not require a static body of state property law * * *."); see also John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252, 1259-1281 (1996).

In the past, for instance, states properly reformed private property rules applicable to oil and gas development when it became increasingly clear that then existing rules would lead to waste and inefficiency. The interdependencies necessarily created by private rights in common natural resources required innovations in private property rules, including pooling and unitization requirements. See Howard R. Williams, Richard G. Maxwell, Charles J. Meyers, & Stephen F. Williams, Oil and Gas -- Cases and Materials, 773-930 (5th ed. 1987). This Court has repeatedly upheld such state laws against constitutional challenge, including

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[32] An alternative proposed by petitioner's amici only underscores the reasonableness of the TRPA program. Consistent with petitioner's extreme view that property owners possess an inherent, fundamental constitutional right to develop property to its highest and best use, amicus proposes that the only constitutional approach to TDRs is for the government to condemn all development rights in the first instance and then auction them off for resale. Amicus Br. Institute for Justice 16-24. Yet, amicus itself candidly acknowledges that such a program is "unlikely" ever to be enacted. *Id.* at 24.

takings claims. See, *e.g. Ohio Oil Co. v. Indiana*, 177 U.S. 190, 210 (1900); *Lindsley v. Natural Carbonic Gas. Co.* 220 U.S. 61, 74-77 (1911); see also *Walls v. Midland Carbon Co.*, 254 U.S. 300, 323-24 (1920).

Analogous challenging circumstances exist in Lake Tahoe. The economic and ecologic viability of the Tahoe Basin, including the private property rights enjoyed therein, depend on the Lake. And the ecological vitality of the Lake in turn depends on careful, comprehensive regulation of activities in the Basin. The value of the lands surrounding Lake Tahoe are as susceptible to wasteful destruction as the oil and gas resources at stake earlier this century.

Petitioner nonetheless posits an extreme, static view of property rights under which government must either allow every landowner to build on their property or pay them "just compensation" not to do so. Under petitioner's view, the downstream adverse effects on shared natural resources have no bearing on the government's ability to restrict development or on its obligation to pay compensation. Nor is it at all relevant that the government's efforts have resulted in enduring economic value to petitioner's own property rights.

As demonstrated by the very facts of this case, such an extreme view of private property rights is not supported by basic fairness or justice concerns, or this Court's precedent. Even private property rights themselves would ultimately be undermined rather than protected by petitioner's extreme view. Where, as in this case, private property rights themselves are dependent on preservation of a common, fragile, ecological resource, like Lake Tahoe, the greatest threat to private property rights may, ironically, be the

assertion of absolute rights in private property that bear no relation to the physical world.[33]

Petitioner, relying on the theoretical writings of Friedrich A. Hayek and Robert Nozick, invites this Court to create, as a matter of federal constitutional law, a fundamental right to develop property capable "of performing its crucial social function of providing a bulwark of personal autonomy against the encroachments of an aggressive, overreaching state." Pet. Br. 21, 22 & n.27. However, "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics * * * [or] embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Nor does the Constitution enact the controversial theories of either Hayek or Nozick. Petitioner's invitation, accordingly, should be declined.[34]

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[33] Carol M. Rose, *Property as the Keystone Right*, 71 Notre Dame L. Rev. 329, 365 (1996) ("[T]he in-your-face rhetoric of property rights can undermine actual institutions of property, suggesting that anything goes, and that the property owner need not care in the least for his fellows. That is not what makes property work to make a society richer. And it is not what makes a democracy work to make a society freer.")

[34] Should the Court, contrary to our submission, conclude that petitioner's claim is ripe, the Court should remand the case back to the lower courts for consideration of the merits of petitioner's regulatory taking claim. Because the only issue raised by the petition for a writ of certiorari is the threshold jurisdictional issue of ripeness, that is the only issue to "be considered by the Court." S.Ct. R. 14.1. On remand, the district court would decide the takings issue in the first instance under the framework announced by this Court in *Penn Central*. Petitioner is mistaken in assuming that the merits will turn on application of this Court's ruling in *Lucas*. Regardless of this Court's disposition of the ripeness issue in this case, the *Lucas* per se takings test for regulations that deprive owners of real property of all economic value will not apply

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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here. See Amicus Br. National League of Cities. The district court has already preliminarily found that, wholly apart from the TDRs, petitioner's property may retain significant residual economic value for possible resale to neighbors. See note 23, *supra*. Hence, whether the TRPA ordinances amount to a taking as applied to petitioner's property will necessarily require substantially more factual inquiry into relevant considerations including, *inter alia*, the reasonableness of petitioner's investment-backed expectations in light of development restrictions existing before and since her purchase, the reasons why petitioner's neighbors were previously allowed to build homes on their properties, the reasonableness of the regulatory means as well as the ends, petitioner's intent and ability to develop since 1972, and any "reciprocity of advantage" petitioner herself enjoys as a result of the very restrictions that she challenges. See *Lucas*, 505 U.S. at 1035-1036 (Kennedy, J., concurring); Amicus Br. League to Save Lake Tahoe 21-27.

APPENDIX

RELEVANT PROVISIONS OF THE TAHOE REGIONAL PLANNING AGENCY CODE OF ORDINANCES

Chapter 6 (Findings Required) A-2

Chapter 20 (Land Coverage Standards) A-3

Chapter 21 (Density) A-14

Chapter 25 (Best Management Practice Requirements) . . A-16

Chapter 33 (Allocation of Development) A-17

Chapter 34 (Transfer of Development) A-26

Chapter 35 (Bonus Unit Incentive Program) A-33

Chapter 37 (Individual Parcel Evaluation System) A-37

CHAPTER 6

FINDINGS REQUIRED

6.0 Purpose: The Tahoe Regional Planning Compact requires TRPA to make findings before taking certain actions. In addition, the Regional Plan package, including the Code and plan area statements, sets forth other findings which must be made. This chapter sets forth procedures describing how TRPA shall make the findings required.

6.1 Applicability: Prior to approving any project or taking any other action specified herein, TRPA shall make the findings required by the provisions of the Regional Plan package, including the Goals and Policies, the Code, and specifically, this chapter and any other requirement of law. All such findings shall be made in accordance with this chapter.

* * * * *

6.3 Threshold-Related Findings: The following specific findings shall be made, pursuant to Articles V(c), V(g) and VI(b) of the Compact in addition to any other findings required by law.

6.3.A Findings Necessary To Approve Any Project: To approve any project, TRPA must find, in accordance with Sections 6.1 and 6.2, that:

(1) The project is consistent with, and will not adversely affect implementation of the Regional Plan, including all applicable Goals and Policies, plan area statements and maps, the Code and other TRPA plans and programs.

(2) The project will not cause the environmental threshold carrying capacities thresholds to be exceeded; and

(3) Wherever Federal, State or local air and water quality standards applicable for the region, whichever are strictest, must be attained and maintained pursuant to Article V(d) of the Tahoe Regional Planning Compact, the project meets or exceeds such standards.

CHAPTER 20

LAND COVERAGE STANDARDS

20.0 Purpose: This chapter sets forth regulations for the permissible amount of land coverage in the Region. It implements provisions of the Goals and Policies concerning the land capability system, land capability districts, prohibition of additional land coverage in certain land capability districts, and transfer and mitigation of land coverage.

20.1 Applicability: All land coverage shall be regulated pursuant to the provisions of this chapter.

* * * * *

20.3 Land Coverage Limitations: No person shall create land coverage in excess of the limitations set forth in this chapter. The means to determine base land coverage, the manner to transfer land coverage and prohibitions of certain land coverage are set forth in this Section.

20.3.A Base Land Coverage Requirements: The allowable base land coverage ("base coverage") shall be determined by using the coefficients set forth in the report entitled, Land Capability Classifications of the Lake Tahoe Basin, Bailey, R. G. 1974. These coefficients are:

Lands Located in Land Capability District*	Base Coverage
1a, 1b, 1c	1%
2	1%
3	5%
4	20%
5	25%
6, 7	30%

*Lands located in Geomorphic Group I are classified land capability district 1 and are permitted one percent coverage.

(1) General Rule: Except as provided in subparagraphs 20.3.A(2), (3) and (4), the coefficients shall be applied to the project area in accordance with Subsection 20.3.D.

* * * * *

20.3.C Manner Of Transferring Land Coverage: Land coverage may be transferred to eligible parcels for eligible uses, in accordance with the percentage limitations, as set forth in Subsection 20.3.B, and the requirements of this subsection. A transfer of land coverage shall be from one parcel or project area to another and shall only be transferred in conjunction with a project approved by TRPA. Land coverage banks may be designated by TRPA pursuant to Section 38.8, to provide land coverage for transfer purposes.

* * * * *

(3) Sending Parcels Classified As Sensitive Lands: If land coverage is transferred from a

sending parcel, or a portion thereof, that is located in Land Capability Districts 1 through 3, inclusive, or is at or below the initial level defining the top rank under IPES (i.e., 725), the coverage transferred shall be permanently retired as set forth in Subparagraph 20.3.C(7) below, and may not be returned to the sending parcel.

(4) Sending Parcels Classified As Non-Sensitive Lands: If land coverage is transferred from a sending parcel, or a portion thereof, that is located in Land Capability Districts 4 through 7, inclusive, or is above the initial level defining the top rank under IPES (i.e., 725), the coverage transferred shall be retired as set forth in Sub paragraph 20.3.C(7) below, but the land coverage may be returned to the sending parcel subject to the limitations of Subsections 20.3.A and 20.3.B.

(5) Hydrologically Related Area Transfer Limitation: For all land coverage transfers, the receiving parcel and the sending parcel shall be in the same hydrologically related area. The hydrologically related area boundaries are depicted upon the TRPA Plan Area Overlays and are incorporated herein. Transfer across said boundaries is prohibited.

* * * * *

(7) Restoration And Retirement Of Land Coverage: Land coverage shall be restored and retired pursuant to Section 34.5 and the following:

(a) Transfers: TRPA shall ensure that land coverage transferred pursuant to Subsection 20.3.C shall be retired

permanently pursuant to the following requirements:

(i) In the event land coverage is removed from the sending parcel, the applicant or a public agency shall restore the sending parcel to a natural or near natural state;

(ii) Provisions for future maintenance and protection of the parcel from further soil disturbance shall be made, whether or not the parcel is undisturbed or subject to restoration; and

(iii) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently assuring the accomplishment of the requirements of Subparagraphs 20.3.C(7)(a)(i) and (ii) shall be recorded by the owner. TRPA shall obtain binding assurance from a public agency that the requirements of Subparagraphs 20.3.C(7)(a)(i) and (ii) are permanently met.

(b) Removal Of Land Coverage For Credit: In the event land coverage is removed on one parcel, but is not proposed for immediate transfer to another parcel, the applicant shall comply with Subparagraphs 20.3.C(7)(a)(i) and (ii), to assure credit for the removed coverage in accordance with Chapter 38.

(8) Land Bank: Land coverage transfers and land

coverage retirement programs may use a land bank pursuant to Chapter 38.

20.4 Prohibition Of Additional Land Coverage In Land Capability Districts 1a, 1c, 2 And 3 And 1b (Stream Environment Zones): No additional land coverage or other permanent land disturbance shall be permitted in Land Capability Districts 1a, 1c, 2, and 3 and Land Capability District 1b (stream environment zones) except as follows:

20.4.A Exceptions For Land Capability Districts 1a, 1c, 2 And 3 Prohibition: The following exceptions apply to the prohibition of land coverage and disturbance in Land Capability Districts 1a, 1c, 2 and 3:

(1) IPES: Land coverage and disturbance for single family houses may be permitted in Land Capability Districts 1a, 1c, 2 and 3, when reviewed and approved pursuant to IPES in accordance with Chapter 37.

(2) Public Outdoor Recreation Facilities: Land coverage and disturbance for public outdoor recreation facilities, which includes public recreation projects on public lands, private recreation projects through use of public lands, and private recreational projects on private lands that are depicted or provided for on a public agency's recreational plan, may be permitted in Land Capability Districts 1a, 1c, 2 and 3 if TRPA finds that:

(a) The project is a necessary part of a public agency's long-range plans for public outdoor recreation;

(b) The project is consistent with the

Recreation Element of the Regional Plan;

(c) The project, by its very nature, must be sited in Land Capability Districts 1a, 1c, 2 or 3, such as a ski run or hiking trail; in accordance with the Guidelines Regarding Public Outdoor Recreation Facilities and Activities Which Create Additional Land Coverage or Permanent Disturbance and Which By Their Very Nature Need Not Be Sited in Sensitive Lands (1a, 1b, 1c, 2, 3, or SEZs), Water Quality Management Plan for the Lake Tahoe Region, Volume I, Table 16, dated November, 1988.

(d) There is no feasible alternative which avoids or reduces the extent of encroachment in Land Capability Districts 1a, 1c, 2 and 3; and

(e) The impacts of the coverage and disturbance are fully mitigated through means including, but not limited to, the following:

(i) Application of best management practices; and

(ii) Restoration, in accordance with Section 20.4.C, of land in Land Capability Districts 1a, 1c, 2 and 3 in the amount of 1.5 times the area of land in such districts covered or disturbed for the project beyond that permitted by the coefficients in Subsection 20.3.A.

(3) Public Service Facilities: Land coverage and disturbance for public service facilities may be permitted in Land Capability Districts 1a, 2c, 2 and 3 if TRPA finds that:

(a) The project is necessary for public health, safety or environmental protection;

(b) There is no reasonable alternative, including relocation, which avoids or reduces the extent of encroachment in Land Capability Districts 1a, 1c, 2 and 3; and

(c) The impacts of the coverage and disturbance are fully mitigated in the manner prescribed by Subparagraph 20.4.A(2)(e).

(4) Water Quality Control Facilities: Land coverage and disturbance may be permitted in Land Capability Districts 1a, 1c, 2 and 3 for erosion control projects, habitat restoration projects, wetland rehabilitation projects, stream environment zone restoration projects, and similar projects, programs and facilities if TRPA finds that:

(a) The project, program or facility is necessary for environmental protection; and

(b) There is no reasonable alternative, including relocation, which avoids or reduces the extent

of encroachment in Land Capability Districts 1a, 1c, 2 and 3.

(c) Impacts are fully mitigated and, if applicable, transferred land coverage requirements pursuant to 20.3.C(2)(e) are met.

(5) Tyrolian Village: Land coverage and disturbance for single family houses may be permitted in Land Capability Districts 1a, 1c, 2 and 3, when reviewed and approved in accordance with Chapter 36, on parcels in Tyrolian Village, Units #1 through 5, inclusive, for which complete applications were filed and accepted by TRPA pursuant to the "Agreement Between The Tyrolian Village, Inc. And The Tahoe Regional Planning Agency Regarding Erosion Control Improvements And Reclassification Of Upper Tyrolian Village" dated May 26, 1983."

20.4.B Exceptions For Land Capability District 1b (Stream Environment Zone): The following exceptions apply to the prohibition of land coverage and disturbance in land capability district 1b (stream environment zone):

(1) Stream Crossings: Land coverage and disturbance for projects to effect access across stream environment zones to otherwise buildable sites, if such projects otherwise comply with applicable development standards in Chapter 27, may be permitted in Land Capability District 1b (stream environment zones) if TRPA finds that:

(a) There is no reasonable alternative, including relocation, which avoids or reduces the extent of encroachment in the stream environment zone, or that encroachment is necessary to reach the building site recommended by IPES; and

(b) The impacts of the land coverage and disturbance are fully mitigated in the manner set forth in Subparagraph 20.4.A(2)(e), with the exception that the restoration requirement in such Subsection shall apply exclusively to stream environment zone lands and shall include coverage and disturbance within the permitted Bailey coefficients.

(2) Public Outdoor Recreation: Land coverage and disturbance for public outdoor recreation facilities may be permitted in Land Capability District 1b (stream environment zones) if TRPA finds that:

(a) The project is a necessary part of a public agency's long range plans for public outdoor recreation;

(b) The project is consistent with the Recreation Element of the Regional Plan;

(c) The project, by its very nature must be sited in a stream environment zone, such as bridges, stream crossings, ski run crossings, fishing trails, and boat launching facilities; in accordance with the Guidelines Regarding Public Outdoor Recreation Facilities and Activities Which Create Additional Land Coverage

or Permanent Disturbance and Which By Their Very Nature Need Not Be Sited in Sensitive Lands (1a, 1b, 1c, 2, 3 or SEZs), Water Quality Management Plan for the Lake Tahoe Region, Volume I, Table 16, dated November, 1988.

(d) There is no feasible alternative which would avoid or reduce the extent of encroachment in the stream environment zone; and

(e) The impacts of the land coverage and disturbance are fully mitigated in the manner set forth in Subparagraph 20.4.A(2)(e), with the exception that the restoration requirement in such Subsection shall apply exclusively to stream environment zone lands and shall include coverage and disturbance within the permitted Bailey coefficients.

(3) Public Service: Land coverage and disturbance for public service facilities may be permitted in Land Capability District 1b (stream environment zones) if TRPA finds that:

(a) The project is necessary for public health, safety or environmental protection;

(b) There is no reasonable alternative, including a bridge span or relocation, which avoids or reduces the extent of encroachment in the stream environment zone; and

(c) The impacts of the land coverage and

disturbance are fully mitigated in the manner set forth in Subparagraph 20.4.A(2)(e), with the exception that the restoration requirement in such Subsection shall apply exclusively to stream environment zone lands and shall include coverage and disturbance within the permitted Bailey coefficients.

(4) Water Quality Control Facilities: Land coverage and disturbance may be permitted in Land Capability District 1b (stream environment zones) for erosion control projects, habitat restoration projects, wetland rehabilitation projects, stream environment zone restoration projects and similar projects, programs and facilities if TRPA finds that:

(a) The project, program, or facility is necessary for environmental protection;

(b) There is no reasonable alternative, including relocation, which avoids or reduces the extent of encroachment in the stream environment zone; and

(c) Impacts are fully mitigated and, if applicable, transferred land coverage requirements pursuant to 20.3.C(2)(e) are met.

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CHAPTER 21

DENSITY

Chapter Contents

21.0 Purpose
21.1 Applicability
21.2 Maximum Density
21.3 Table of Maximum Densities
21.4 Calculation Of Maximum Density
21.5 Existing Density
21.6 Developments Rights

21.0 Purpose: The purpose of this chapter is to establish maximum densities, to set forth methods for calculating maximum densities, and to distinguish development rights from density.

21.1 Applicability: The provisions of this chapter are applicable to all projects and activities. This chapter applies primarily to residential uses, tourist accommodations, developed campgrounds, recreational vehicle parks, and group recreation facilities.

* * * * *

21.6 Development Rights: Development rights, as defined in Chapter 2, shall be assigned and utilized in accordance with the following provisions:

21.6.A Legally Existing: Parcels legally existing on the effective date of the Regional Plan, July 1, 1987, shall be assigned a development right except as set forth below:

(1) Parcels which are located in Land Capability Districts 4, 5, 6, or 7, are within a community plan area, and are eligible for tourist accommodation or commercial uses, shall not have a development right.

(2) Parcels that contained one or more of the primary uses listed in the Section 18.3 under Residential, Tourist Accommodation, Commercial, or Public Service, on the effective date of the Regional Plan, shall not have a development right, except as otherwise provided in Subsection 21.6.D.

(3) Parcels that contained one or more of the primary uses listed in Section 18.3 under Recreation, on the effective date of the Regional Plan, shall not have a development right, except that parcels with only dispersed outdoor recreation as a primary use shall have a development right.

(4) Parcels that contain one or more of the following uses in Section 18.3 under Resource Management, on the effective date of the Regional Plan, shall not have a development right:

(a) Tree farms;
(b) Farm/ranch accessory structure;
(c) Grazing;
(d) Range pasture, management;
(e) Range improvement; or
(f) Open space.

(5) Littoral parcels that contain one or more of the primary uses listed in Section 51.2, on the effective date of the Regional Plan, shall not have a development right, except that a parcel with the primary use of dispersed water-oriented, outdoor recreation, salvage operations, or safety and navigation facilities shall have a development right.

(6) Parcels which are burdened by an easement or other restriction incompatible with a residential use;

(7) Parcels which were created as a result of an eminent domain or similar government action or are otherwise remnants of a prior transaction, and which do not contain sufficient area to construct a single-family residence; and

(8) Parcels which were created for the purpose of public service uses or easements, including, but not limited to, public utilities and public recreation.

21.6.B Transfer of Development Rights: Transfer of development rights shall comply with the density limitations set forth in this chapter and the transfer provisions set forth in Chapter 34.

21.6.C Construction of Residential Unit: A development right or multi-residential bonus unit shall be required for each additional residential unit approved in accordance with Chapter 33.

21.6.D Parcels Containing a Residential Unit Destroyed by Calamity: A parcel containing a residential unit on the effective date of the Regional Plan, which unit is destroyed or damaged by fire or other similar calamity, shall have a development right.

CHAPTER 25

BEST MANAGEMENT PRACTICE REQUIREMENTS

Chapter Contents

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25.1 Applicability
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25.4 Priority For Installation Of Retrofitting Measures

25.5 Standard BMP Requirements
25.6 Additional Requirements
25.7 Special Circumstances
25.8 Maintenance Of BMPs

25.0 Purpose: This chapter sets forth the requirements for installation of Best Management Practices (BMPs) for the protection or restoration of water quality.

25.1 Applicability: BMPs, as described in the Handbook of Best Management Practices (Volume II of the Lake Tahoe Basin Water Quality management Plan), or equivalent practices approved by TRPA, shall be applied to all public and privately owned lands.

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CHAPTER 33

ALLOCATION OF DEVELOPMENT

Chapter Contents

33.0 Purpose
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33.2 Allocation Of Additional Residential Units
33.3 Allocation Of Additional Commercial Floor Area
33.4 Allocation Of Additional Tourist Accommodation Units
33.5 Regulation Of Additional Public Service Facilities
33.6 Regulation Of Additional Recreation Facilities
33.7 Election Of Conversion Of Use
33.8 Other Permits

33.0 Purpose: This chapter sets forth the requirements for regulating the rate and timing of growth within the region. In conjunction with other provisions of this Code and the Goals and Policies, this chapter, through issuance of allocations, distributes, in an orderly fashion, growth and development within the confines of attainment and maintenance of the environmental

thresholds. An allocation issued pursuant to this chapter does not give the recipient thereof a right to develop a project.

33.1 Applicability: No person shall construct a project or commence a use or activity, which requires an allocation unless an allocation is obtained in accordance with this chapter; the parcel is eligible to use an allocation; and the project is approved by TRPA. For purposes of this chapter, where the term "existing" is used it shall not include structures or facilities that have become derelict. (See Chapter 2.)

33.2 Allocation Of Additional Residential Units: TRPA shall allocate the development of additional residential units as follows:

33.2.A Requirement Of Allocation: No person shall construct a project or commence a use, which creates one or more additional residential units, without first receiving an allocation approved by TRPA. This requirement does not apply to affordable housing units approved after January 1, 1986, but shall apply to conversions of such affordable housing to nonaffordable status. In order to construct the project or commence the use, to which the allocation pertains, the recipient of the allocation shall comply with all other applicable provisions of this Code.

(1) Applicable Residential Uses: The following residential uses referred to in Chapter 18 contain residential units: secondary residences; employee housing; mobile home dwellings; multiple family dwellings; multi-person dwellings; nursing and personal care facilities; residential care facilities; single family dwellings; and summer homes.

(2) Definition Of "Additional Residential Unit": Residential unit is defined in Chapter 2. A residential unit is considered "additional" if it is to be created pursuant to a TRPA approval issued on or after January 1, 1986. The conversion of an existing nonresidential use to a residential use constituting a residential unit is an additional residential unit requiring an allocation under this chapter. The following are not "additional" residential units:

(a) The reconstruction or replacement, on the same parcel, of a residential unit legally existing on or approved before January 1, 1986;

(b) The reconstruction or replacement, on the same parcel, of a residential unit which was allocated and approved pursuant to this Code;

(c) Legally established additions and accessory uses to an existing residential structures, that do not create additional residential dwelling units;

(d) A residential unit constructed on a foundation, the use of which is authorized by Chapter 11.

(e) The relocation of residential units legally existing on January 1, 1986, other than mobile home dwellings, through a transfer approved by TRPA;

(f) The relocation of a legally established mobile home dwelling with existing water, sewer, and electrical services to a

mobile home development or to a multi-family dwelling of five units or more, pursuant to a transfer approved by TRPA; or

(g) An existing, legally established mobile home pad with water, sewer and electrical services, whether or not a mobile home is located thereon.

(3) Maximum Number Of Units And Distribution Of Allocations Among Jurisdictions: From January 1, 1992 to December 31, 1996, a maximum of 1,500 additional residential units may be authorized to receive permits for construction. The allocation and distribution of these units shall be pursuant to the following table: [table omitted]

(a) A total of 1600 additional multi-residential development rights shall be available for the 20-year life of this Plan as bonus units in conjunction with transfer of development rights and/or other TRPA incentive programs designed to attain the goals and objectives of this Plan. Multi residential units shall be subject to the foregoing allocation limitations.

(b) Unused allocations may be added to a jurisdiction's successive year's allocations through 1996.

(c) Allocations assigned to the City of South Lake Tahoe and the STPUD service area within El Dorado County may be assigned to parcels within either

jurisdiction provided the sending jurisdiction approves the reassignment. Such reassignment shall not be considered an allocation transfer.

(d) 1992 allocations assigned to the City of South Lake Tahoe and the STPUD service area within El Dorado County shall not be issued unless it is determined that sufficient disposal capacity exists.

(e) In the event a lack of sewage capacity results in an imbalance of allocations to the STPUD service area, TRPA shall develop a program to recognize the imbalance for the year 1993 and beyond, if sewage capacity becomes available.

33.2.B Distribution And Administration Of Residential Allocations: Residential allocations shall be distributed and administered in accordance with the Goals and Policies, this Code, and the Rules of Procedure.

(1) Distribution Systems Requirement: Distribution of allocations for 1993 and beyond shall be by a method or system which permits the participation of parcels with scores below the numerical level defining the top rank in the applicable jurisdiction.

(a) TRPA shall reserve 10 percent of each jurisdiction's annual allocations for distribution to parcels below the IPES line. The reserved allocations shall be distributed by a method of random selection by TRPA. A county or city

may elect to distribute the reserved allocations, or may be exempt from the set-aside requirement, provided TRPA finds the substitute system or the city/county distribution system, as the case may be, provides an equal or superior opportunity for participation of parcels below the IPES line.

(b) Allocations distributed by TRPA under this subsection may either be transferred or returned to TRPA for reissuance to the jurisdiction of origin.

(c) A complete application for transfer of a reserved allocation shall be filed no later than June 1 of the year it was distributed.

(d) Upon transfer of a reserved allocation, a complete application for an additional residential unit shall be filed no later than December 31, 1994. Failure to submit a complete application for a transfer by June 1, 1994 or to file a complete application for a new residential unit by December 31, 1994 shall result in the forfeiture of the allocation to the jurisdiction of origin.

(2) Distribution: Distribution of allocations, within the limits set in Subsection 33.2.A and consistent with subparagraph (1) above, shall be determined by the counties and city. If any county or city chooses not to distribute allocations within its jurisdiction, then TRPA shall distribute the allocations pursuant to an allocation system adopted by TRPA.

(a) Each county and the city shall notify TRPA, in writing, of its election to distribute allocations for a given year or years. Notification must be received by TRPA no later than December 31 of the preceding year. The Governing Board may waive this deadline for good cause.

(b) TRPA shall deliver allocations to the counties and city no later than January 15, of the year for which the allocations are reserved, or within 15 days of the effective date of an ordinance providing for residential allocations for that year, whichever is later.

(c) Allocations which are carried over from previous years shall be delivered to the counties and city within 15 days of a determination by TRPA that the allocations are unused and may be reissued.

(d) Delivery of allocations shall be accomplished by providing each county and city with the number of allocation forms which corresponds to the allocations available to each county and city in that year. The counties and city shall determine the receiving parcels pursuant to their respective allocation systems and shall indicate the assessor's parcel number (APN) of the receiving parcel on the allocation form. The counties and city shall provide TRPA with a list of assessor parcel numbers which received an allocation. The original allocation forms shall be delivered to the owner of record of the

receiving parcel and shall, in addition to the list, constitute evidence of receipt of an allocation.

(e) TRPA shall number each allocation as follows:

(i) The first set of letters shall signify the county or city of origin (e.g., WA, DG, PL, EL, SLT);

(ii) The first set of numbers shall signify the year of issuance (e.g., 87, 88, 89, 90, 91);

(iii) The second set of letters shall signify the type of allocation (e.g., O for original, R for reissued, LS for litigation settlement);

(iv) The second set of numbers shall signify the sequence of the allocation (e.g., for Douglas County the sequence will be 1 through 23). (Example PL - 87 - R - 56 County-Year-Type-Number)

(f) The counties and city shall notify each owner of a parcel receiving an allocation.

(g) In the event an allocation is returned or forfeited for any reason, the county or city shall notify TRPA by returning the original allocation form and requesting a reissued allocation for assignment to another parcel. If the original allocation form cannot be returned to TRPA, the county or city shall notify TRPA of the

reason therefor, and the allocation shall be canceled by depositing in the U. S. Mail, first class, postage prepaid, a notice of cancellation addressed to the last known address of the owner of the receiving parcel.

(3) Administration: An allocation shall entitle the owner of the receiving parcel to either apply for a TRPA permit to construct an additional residential unit or to transfer the allocation to another parcel pursuant to Chapter 34. Distribution of, and other transactions concerning allocations, shall be tracked, accounted for and otherwise treated in accordance with Chapter 38.

(a) Upon receipt of the allocation form from the county or city, the owner of the parcel may file an application with TRPA to either construct a residential unit or transfer the allocation. Failure to either file a complete application or complete a transfer by the deadlines set in subparagraphs (b) and (c) below, shall result in the forfeiture of the allocation to the county or city of origin.

(b) Except as set forth in Section 33.2.C, Multi-Residential Allocations, and subparagraph (d), below, complete applications for construction of additional residential units shall be filed with TRPA no later than December 31 of the year in which the allocation was distributed.

(c) Transfer of allocations shall be complete no later than December 31, of

the year in which the allocation was distributed. Transfers of allocations shall be deemed complete when the applicant has received a TRPA notice of eligibility for the transfer and the original allocation form has been signed by the owners of the transferor and transferee parcels, the county or city which issued the allocation, and TRPA. The signatures of the receiving and sending county or city shall be required for intercounty transfers.

(d) Upon transfer of an allocation, a complete application for an additional residential unit shall be filed no later than June 1 of the year after the issuance of the allocation. Failure to file a complete application by June 1 shall result in the forfeiture of the allocation to the city or county of origin.

CHAPTER 34

TRANSFER OF DEVELOPMENT

Chapter Contents

34.0 Purpose
34.1 Applicability
34.2 Transfer Of Residential Development Right
34.3 Transfer Of Residential Allocations
34.4 Transfer Or Relocation Of Existing Development
34.5 Restriction Or Retirement Of Parcels
34.6 Basic Service Requirements

34.0 Purpose: This chapter sets forth the provisions for the transfer of residential development rights, residential allocations, and existing development, from one parcel

to another as provided in the Goals and Policies, Development and Implementation Priorities Subelement, Implementation Element, Goal #3, Policies 1 - 5. The transfer of land coverage is addressed in Chapter 20.

34.1 Applicability: This chapter applies to the transfer of residential development rights, residential allocations, and existing development. All such transfers require TRPA approval. Transfer of a residential development right or allocation does not constitute a project approval. Transfers of existing development can occur only in conjunction with a project.

34.2 Transfer Of Residential Development Right: A residential development right, as defined in Chapter 2, may be transferred to another parcel pursuant to the following provisions:

34.2.A Vacant Parcel: The parcel from which the right is transferred shall be vacant and have a residential development right;

34.2.B Parcel Retirement: The parcel from which the development right is transferred is retired pursuant to Section 34.5 at the time of transfer;

34.2.C Receiving Area: The parcel receiving the development right shall be in a plan area or community plan where residential uses are permissible and shall meet the following criteria:

(1) Parcels Eligible To Receive One Or More Development Rights: Parcels located in a plan area or community plan designated as a receiving area for multi-residential units shall be eligible to receive one or more development rights, or,

(2) Parcels Eligible To Receive One Development Right:

(a) One development right may be transferred to a parcel for the purpose of constructing a secondary residence, provided the building site for the secondary residence is in Land Capability Districts 4, 5, 6 or 7.

(b) One development right may be transferred to a parcel that was not assigned a development right provided the parcel has a building site in Land Capability Districts 4, 5, 6 or 7, or, if applicable, is in the top rank under IPES.

34.2.D Density: The transfer complies with the density of use provisions for the receiving parcel;

34.2.E Local Approval: The approval of affected local governments shall be obtained;

34.3 Transfer of Residential Allocations: If, pursuant to Chapter 33, a parcel is assigned a residential allocation, the allocation may be transferred to another parcel, pursuant to the following provisions and the provisions of Section 36.4 if applicable.

34.3.A Parcel Classification: The allocation transfer is from a parcel determined to be in Land Capability Districts 1a, 1b, 1c, 2 or 3; shorezone tolerance districts 1, 2, 3, or 4; below the top rank IPES line, if applicable; or unsuitable for development due to the inability of the property to meet TRPA or local government development standards.

34.3.B Building Site: The receiving parcel has a building site that is determined to be in Land Capability Districts 4, 5, 6, or 7; or, if applicable, in the top rank under IPES.

34.3.C IPES Limitation: No allocation shall be transferred to any parcel that is below the initial level defining the top rank under IPES unless the number of vacant parcels in the top rank at the time of the proposed transfer is less than 1/2 the total inventory in that jurisdiction;

34.3.D Permissible Use: The receiving parcel is in a plan area or community plan where residential uses are permissible use on the receiving parcel.

* * * * *

34.3.G Parcel Retirement: The sending parcel is retired pursuant to Section 34.5 at the time the allocation is transferred.

34.4 Transfer Or Relocation Of Existing Development: Certain elements of existing development may be transferred or relocated from one parcel to another if the receiving parcel is in a plan area or community plan area designated as a receiving area for existing development. Existing residential development may be transferred to any plan area where residential use is a permissible use. The transfer of existing development shall not be considered additional development and is exempt from the applicable allocation system.

* * * * *

34.5 Restriction Or Retirement Of Parcels: Restriction or retirement of parcels, or portions of parcels, for the purposes set forth in this Code, shall comply with the following requirements:

34.5.A Land Coverage: Parcels from which land coverage has been transferred are subject to provisions of Chapter 20.

34.5.B Allocation Transfer: Parcels from which allocations have been transferred shall be permanently retired.

(1) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently removing the development rights shall be recorded by the owner.

(2) For parcels in public ownership, the public agency shall provide TRPA with binding assurance that the development rights have been permanently retired.

34.5.C Existing Development Transfer: For parcels from which units of existing development have been transferred, the structures or facilities accounting for that use shall be removed or modified and the land restored and maintained in as natural a state as is possible, so as to eliminate the units transferred.

* * * * *

34.5.E Transfer Of All Existing Development From Sensitive Lands: Parcels in Land Capability Districts 1a, 1b, 1c, 2, or 3, or SEZ, from which all units of existing development have been transferred, shall be restored pursuant to Subsection 34.5.C and shall be permanently restricted to open space by a deed restriction, or other covenant running with land, recorded by the owner.

34.5.F Transfer Of Some Existing Development From Sensitive Lands: Parcels in Land Capability Districts 1a, 1b, 1c, 2, or 3, or SEZs, from which less than all units of existing development have been transferred, shall be permanently restricted from transferring development back to the parcel by deed restriction, or other covenant running with the land, recorded by the owner.

34.5.G Transfer Of Existing Development From Non-Sensitive Lands: Parcels located in Land Capability Districts 4, 5, 6, or 7, from which units of existing development have been transferred, shall be restricted by deed restriction, or other covenant running with the land, recorded by the owner. The restriction shall limit the units of use to any remaining, until or unless:

(1) A transfer back to the parcel, is approved by TRPA pursuant to this chapter;

(2) An allocation is obtained pursuant to an approved community plan; or

(3) Results in the elimination of nonconforming use.

34.5.H Development Rights Transfer On Sensitive Lands: Parcels in Land Capability Districts 1a, 1b, 1c, 2, or 3, or SEZ, from which all residential development rights have been transferred, shall be permanently retired.

(1) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently removing the development rights from the parcel shall be

recorded by the owner.

(2) For parcels in public ownership, the public agency shall provide TRPA with binding assurance that the development rights have been permanently retired.

34.5.I Development Right Transfer On Non-Sensitive Lands: Parcels located in Land Capability Districts 4, 5, 6 and 7, from which all residential development rights have been transferred, shall be restricted to open space by deed restriction, or other covenant running with the land, recorded by the owner, but shall be eligible to receive future transfers of coverage or units of use if otherwise permitted in (1), (2) and (3) of Subsection 34.5.G above.

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CHAPTER 35

BONUS UNIT INCENTIVE PROGRAM

Chapter Contents

35.0 Purpose
35.1 Applicability
35.2 Multi-Residential Incentive Program
35.3 Tourist Accommodation Bonus Unit Program
35.4 Determination of Project Cost

35.0 Purpose: This chapter sets forth provisions for assigning multi-residential and tourist accommodation bonus units in accordance with the Goals and Policies, Land Use Element, Land Use Subelement, Goal #2, Policies 5A and 5B, and Implementation Element, Development and Implementation Subelement, Goal #2, Policies 2F and 3, and Goal #3, Policies 1 and 2.

35.1 Applicability: The assignment of multi-residential and tourist accommodation bonus units shall comply with the provisions set forth in this chapter. Such assignments shall occur only in conjunction with a project approved by TRPA.

35.2 Multi-Residential Incentive Program: Multi-residential bonus units may be approved for use only on parcels located in plan areas or community plans designated as eligible for the Multi- Residential Incentive Program.

35.2.A Assignment Of Bonus Units: Pursuant to Chapter 13, a maximum of 1,600 multi-residential bonus units shall be assigned to plan areas.

35.2.B Criteria: All projects receiving multi-residential bonus units pursuant to this chapter shall comply with the following criteria:

(1) The proposed density, including any multi-residential bonus units, shall not exceed the maximum density limits set forth in the plan area statement, applicable community or redevelopment plan, or this Code.

(2) Multiple family dwellings shall be designated in the plan area or community plan as an allowed use, or a special use for which the findings required in Section 18.1 have been made.

(3) The project shall be located within a plan area or community plan designated as eligible for the Multi-Residential Incentive Program.

(4) The multi-residential bonus units received by the project shall not exceed the number of multi-residential bonus units assigned to the plan area or community plan in which the project is located.

(5) Except for affordable housing units, an allocation shall be required pursuant to Chapter 33 in order to utilize ulti-residential bonus units.

35.2.C Determination Of The Number Of Bonus Units: Applications for projects proposing the use of residential bonus units shall include a list and description of all mitigation measures identified in Subsection 35.2.D that are proposed as part of the project. Based on review of the list and description of the mitigation measures proposed, TRPA shall determine a score for the project in accordance with Subsection 35.2.D. One residential bonus unit may be approved for each ten points received by a project. Bonus units, so

determined, may be reserved for projects based on the proposals submitted prior to project approval to enable applicants to accumulate allocations. Bonus units shall be assigned to a parcel and may be reserved as credits, unused, for no more than five years. TRPA may reissue those credits to the same parcel for an additional five years, if TRPA finds that the bonus units are likely to be used during that period.

* * * * *

35.2.D Mitigation Measures: Projects proposing the use of multi-residential bonus units shall receive a score only when one or more of the following mitigation measures are proposed as part of the project. Any combination of the listed measures may be proposed. Only those mitigation measures that would not other wise be required by the Code shall be considered in determining the score received by a project. This subsection establishes the maximum number of points that may be awarded for each mitigation measure. When a mitigation measure satisfies the requirements of two or more of the mitigation measures listed below, points shall be awarded based on the mitigation measure resulting in the highest score. The total point score shall be rounded down to a number which is a multiple of ten.

* * * * *

(3) Provision of stream zone restoration pursuant to TRPA's Stream Environment Zone Restoration Program (excluding restoration required as mitigation for new SEZ disturbance) - (project cost divided by $5,000)

x 20 points.

(4) Retirement, in accordance with Chapter 34, of an undeveloped parcel located in Land Capability Districts 1a, 1b (SEZ), 1c, 2, or 3:

(a) If the parcel is in Land Capability Districts 1a, 1c, 2, or 3 - 10 points per transferred unit.

(b) If the parcel is in Land Capability District 1b or in a stream environment zone - 30 points per transferred unit.

(5) Transfer of existing residential unit and retirement of the parcel in accordance with Chapter 34:

(a) If the parcel is in Land Capability Districts 1a, 1c, 2, or 3 - 10 points per transferred unit.

(b) If the parcel is in Land Capability District 1b or in a stream environment zone - 40 points per transferred unit.

(6) Provision of public access to recreation areas, lakes, streams, or vista points to which access was previously nonexistent - (project cost divided by $5,000) x 10 points (maximum 50 points).

(7) Projects proposing less land coverage than the maximum amount otherwise allowed in accordance with Chapter 20 shall receive one point for each such reduction of 600 square feet onsite.

(8) Participation in projects identified in the

TRPA approved Scenic Restoration Program - (project cost divided by $5,000) x 10 points.

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CHAPTER 37

Individual Parcel Evaluation System

Chapter Contents

37.0 Purpose
37.1 Applicability
37.2 Evaluation Criteria
37.3 Procedures For Establishing SEZ Boundaries And Setbacks
37.4 Area To Be Evaluated
37.5 Evaluation Teams
37.6 Parcels Eligible For Evaluation
37.7 Most Likely Building Site
37.8 Ranking Of Parcels
37.9 Notification Of Property Owners
37.10 Change In IPES Score
37.11 Allowable Base Land Coverage

37.0 Purpose: This chapter establishes the Individual Parcel Evaluation System (IPES), and related procedures, in accordance with Goal #1, Policy 1 of the Development and Implementation Priorities Subelement, Implementation Element of the Goals and Policies. By December 31, 1988 all vacant residential parcels shall be evaluated, assigned a numerical score and ranked within each local jurisdiction from most suitable to least suitable for development in accordance with this chapter.

37.1 Applicability: Commencing on January 1, 1989, review and approval by TRPA of the construction of single family dwellings shall be in accordance with IPES.

Review and approval of applications for construction of single family dwellings under IPES shall not commence until all vacant residential parcels have been scored and ranked in accordance with IPES.

* * * * *

37.4.A(3) Parcels Containing A SEZ: Where a parcel contains an SEZ, the evaluation team shall evaluate only that portion of the parcel located outside the SEZ. The score received by parcels containing less than 5,000 square feet outside an SEZ shall be multiplied by a factor equal to the area outside the SEZ divided by 5,000 square feet. Parcels containing no area outside an SEZ or SEZ setback shall receive a total score of zero.

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37.5 Evaluation Teams: The members of each evaluation team shall be selected by TRPA and shall consist of professionals in the fields of soil science, hydrology and engineering or planning.

* * * * *

37.8 Ranking Of Parcels: Once all eligible parcels within a particular jurisdiction have received a numerical score, the parcels shall be ranked, by jurisdiction, from the most suitable (those parcels receiving the highest numerical score)to the least suitable (those parcels receiving the lowest numerical score).

37.8.A Deadline For Ranking: Ranking of all eligible parcels shall be completed and considered for adoption by December 31, 1988.

37.8.B Establishment Of Level Defining Top Ranked

Parcels: By January 1, 1989, TRPA shall establish an initial numerical level in the rankings immediately above the most sensitive parcels. The initial level shall be at the same numerical value for all jurisdictions. Parcels having scores above the level established herein, and as lowered pursuant to Subsection 37.8.C, shall be the top ranked parcels within each jurisdiction.

(1) Procedure For Establishing Initial Numerical Level: Once all eligible parcels have received a score under IPES and TRPA has taken a final action on requests for reevaluation pursuant to Subsection 37.10.C, the initial numerical level defining the top ranked parcels shall be established by TRPA in accordance with the following procedures. Parcels determined by the IPES field evaluation teams to be located in a soil series not identified in the report entitled "Soil Survey, Tahoe Basin Area, California and Nevada," prepared by the Soil Conservation Service and Forest Service and dated March 1974, shall be excluded from this procedure.

(a) A numerical value shall be established such that the number of vacant residential parcels located above the value equals the number of vacant residential parcels that on March 1, 1988 are shown on TRPA's Land Capability Overlay maps as having at least 51 percent of their area located in Land Capability Districts 4, 5, 6 and 7.

(b) A zone shall be established between the numerical values that are ten percent greater than and ten percent less than the

numerical value established under (a), above.

(c) Based on the soil series and average slope determined by the IPES field evaluation teams, parcels that would otherwise be classified as Land Capability District 3, in accordance with the soil series and slope ranges set forth for Land Capability District 3 lands in the Bailey Report, shall be identified and the arithmetic mean of the scores received by these parcels shall be determined.

(d) Based on the soil series and average slope determined by the IPES field evaluation teams, parcels that would otherwise be classified as Land Capability District 4, in accordance with the soil series and slope ranges set forth for Land Capability District 4 lands in the Bailey Report, shall be identified and the arithmetic mean of the scores received by these parcels shall be determined.

(e) The arithmetic mean of the values established under (c) and (d), above, shall be determined.

(f) If the value established under (e), above, is within the zone established in (b), above, then the initial numerical level shall be set at the value established under (e), above. If the value established under (e), above, is outside the zone established in (b), above, then the initial numerical level shall be set at the

numerical value of the zone boundary that is closest to the value established under (e), above.

37.8.C Lowering Numerical Level Defining Top Ranked Parcels: Provided TRPA makes the findings required under Subparagraph (1) of this Subsection, the numerical level defining the top ranked parcels in any jurisdiction shall be lowered, on an annual basis commencing on January 1, 1990, to include in the top rank a number of parcels equal to the number of parcels in that jurisdiction that used allocations during the previous year in accordance with Chapter 33.

(1) Required Findings: The numerical level defining the top ranked parcels shall not be lowered unless TRPA makes the following findings with respect to the applicable local jurisdiction:

* * * * *

37.8.E Eligibility To Compete For Allocation: All parcels receiving a score under IPES shall be eligible to compete for residential allocations. Top ranked parcels that receive a residential allocation may pursue issuance of a TRPA permit to construct a new single family house. Parcels with score below the level defining the top ranked parcels may, if in receipt of a residential allocation, exercise any of the options listed below:

(1) Transfer the allocation in accordance with Chapter 34;
(2) Relinquish the allocation; or
(3) Transfer other development rights in

accordance with Chapter 34.

* * * * *

37.11 Allowable Base Land Coverage: The allowable base land coverage for residential parcels evaluated under IPES shall be a function of the parcel's combined score under the IPES criteria for relative erosion hazard and runoff potential as correlated with the coverage coefficients and land capability districts of the Bailey Report. The allowable base land coverage under IPES shall be established in accordance with the following procedures and shall be considered for adoption by TRPA no later than January 1, 1989.

37.11.A Procedure For Establishing Allowable Base Land Coverage: Once eligible parcels have received a score under IPES, and TRPA has taken action on requests for reevaluation pursuant to Subsection 37.10.C, the percentage of allowable base land coverage shall be established by TRPA in accordance with the following procedures:

(a) Based on the soil series and average slope determined by the IPES evaluation teams, all parcels receiving a score under IPES shall be identified as to which of the seven capability classes established in the Bailey Report each parcel would have been classified. Parcels determined by the IPES evaluation teams to be located in a soil series not identified in the report entitled "Soil Survey, Tahoe Basin Area, California and Nevada," prepared by the Soil Conservation Service and Forest Service and dated March 1974, shall be excluded from this procedure.

(b) The combined scores for Relative Erosion Hazard and Runoff Potential representing the central tendency within each capability class shall be determined. The central tendency shall be described by determining the mode value, or by alternative statistical methods, including mean or median values, whichever is appropriate.

(c) The central tendency scores established in (b), above, shall be plotted, in graph form, against percentages of allowable base land coverage ranging from one percent to thirty percent. The central tendency score for Land Capability Districts 1a, 1c, and 2, shall be plotted at one percent; for Land Capability District 3 at five percent; for Land Capability District 4 at 20 percent; for Land Capability District 5 at 25 percent; and for Land Capability Districts 6 and 7 at 30 percent. If the central tendency scores of any of the capability classes set forth in (c), above, are determined to be statistically indistinguishable, such classes shall be combined for purposes of establishing a central tendency score. If capability classes are combined, the central tendency score shall be plotted at the percentage that is the average of the percentages established for those classes in Subsection 20.3.A of the TRPA Code.

(d) TRPA shall develop a formula for a line passing through the points of central tendency plotted in accordance with (c),

above. No parcel shall be allowed more than 30 percent, or less than one percent base land coverage.

(e) Allowable base land coverage for parcels receiving a score under IPES shall be established in accordance with the formula developed in (d), above.

37.11.B Application Of Allowable Base Land Coverage Percentages: The percentages of allowable base land coverage established in accordance with Section 37.11 shall be applied as follows to determine the total allowable base land coverage:

(1) Parcels Of 1/3 Acre Or Less In Size: The percentage of allowable base land coverage shall be applied to the entire parcel area, except in cases where the parcel contains areas classified as SEZ or backshore. In such cases, the percentage of allowable base land coverage shall be applied to only that area outside the SEZ and backshore. The allowable base land coverage of one percent in the SEZ and backshore may be combined with the allowable base land coverage for the remainder of the parcel to establish a total allowable base land coverage for the parcel. A portion of the total allowable base land coverage for the parcel may be used to allow construction of access only through the SEZ, provided TRPA makes the findings required in Subparagraph 20.4.B(1), and through the backshore, provided TRPA makes the findings required in Section 55.4.

(2) Parcels Greater Than 1/3 Acre But Less Than 5 Acres In Size: The percentage of

allowable base land coverage shall be applied to the 1/3 acre evaluated by the evaluation team. If the owner of the parcel is able to identify a larger and contiguous area that has the same characteristics as the 1/3 acre originally evaluated and TRPA concurs, the percentage of allowable base land coverage shall be applied to the larger area. Allowable base land coverage on parcels that contain a SEZ shall be calculated in accordance with Subparagraph (1) above.

(3) Parcels Of Five Acres Or Greater In Size: The percentage of allowable base land coverage shall be applied to all that portion of the parcel that the evaluation team identifies as having the same characteristics as and being contiguous to the area evaluated.